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TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1886.

No. 1341.

H. A. CARPER, JAILOR OF PULASKI COUNTY, VIRGINIA, APPELLANT,

vs.

RICHARD L. FITZGERALD.

APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE EASTERN DISTRICT OF VIRGINIA.

FILED FEBRUARY 7, 1887.

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JUDD & DETWEILER, PRINTERS, WASHINGTON.

1 : *Petition for Habeas Corpus.*

In the Circuit Court of the United States for the Eastern District of Virginia, at Richmond, Va., February 3d, 1887.

Ex Parte RICHARD L. FITZGERALD. No. 46.

Be it remembered that on this third day of February, 1887, the following orders were recorded and the following papers filed in the above-entitled cause in the clerk's office of the circuit court of the United States for the eastern district of Virginia, viz:

Petition.

To the Hon. Hugh L. Bond, judge of the circuit court of the United States of America:

Humbly complaining, your petitioner, Richard L. Fitzgerald, would respectfully represent to your honor that he is a citizen of the State of Pennsylvania, in the United States of America; that he is the duly authorized travelling salesman for the mercantile house of Austin, Fields & Co., of Philadelphia, in the State of Pennsylvania; that the said firm of Austin, Fields & Co. tendered, on the 16th day of December, 1886, to Samuel C. Greenhow, treasurer of the city of Richmond and State of Virginia, coupons for the sum of $99 and $1.75, in lawful money of the United States; that
2 the said coupons were cut from bonds of the Commonwealth of Virginia, issued under the provisions of an act of her General Assembly, approved March 30th, 1871, entitled "An act to provide for the funding and payment of the public debt;" that the same were overdue and past maturity, and each bore upon its face the contract of the State of Virginia that it should be received in payment of all taxes, debts, demands, and dues due to the said State; that said tender was made for the purpose of procuring a license from December 16th, 1886, to December 16th, 1887, for said Austin, Fields & Co. as sample merchants in the State of Virginia, and at the time of said tender, demand was made of the said Samuel C. Greenhow for a certificate in writing stating the deposit of said coupons and money with him for the purpose of obtaining a license to sell by sample, card, description, or representation goods, wares, [and] merchandise in the State of Virginia; but the said Greenhow refused to give them the said certificate, or any other certificate; that your petitioner, the said Richard L. Fitzgerald, as the duly authorized, true, and lawful attorney and agent of the said Austin, Fields & Co., afterwards, to wit, on the 25th day of January, 1887, in the county of Pulaski and State of Virginia, was selling and offering for sale, by sample, the goods, wares, and merchandise of the said Austin, Fields & Co.; when he was arrested, by virtue of the authority and
3 power of the Commonwealth of Virginia, upon the charge that petitioner was violating the law of said State by selling and offering to sell goods without license; and he is now unlawfully held in custody and restrained of his liberty, in violation of the Constitution of the United States, by one H. C. Carper, jailer

of the county of Pulaski and State of Virginia. Petitioner files herewith the affidavits of G. S. Vashon, Jr., Wm. H. Sands, and Wm. L. Royall, which he prays may be taken as part of this petition.

The prayer of your petitioner therefore is that the writ of *habeas corpus* may issue to the said H. C. Carper, jailer as aforesaid, commanding him to bring your petitioner before your honor, and to make return to said writ of the causes of your petitioner's detention.

And your petitioner, as in duty bound, will ever pray, &c.

RICHARD L. FITZGERALD.

STATE OF VIRGINIA, *County of Pulaski,* } *To wit:*

I, William H. Davis, a commissioner in chancery for the county of Pulaski and State of Virginia, do certify that Richard L. Fitzgerald, whose name is signed to the foregoing petition, personally appeared before me, in my county and State aforesaid, and made oath that the facts set forth in said petition are true to the best of his knowledge and belief.

Given under my hand this 27th day of January, 1887.

WM. H. DAVIS, *Comm'r.*

4 *Order on Foregoing Petition.*

M. F. Pleasants, clerk circuit court of the United States, east. dist. of Virginia:

Issue the writ of *habeas corpus* as prayed, and make it returnable before me, at the United States court-house in Baltimore, on the second day of February, 1887, at twelve o'clock m.

Baltimore, Md., Jan'y 29, 1887.

HUGH L. BOND, *Ct Judge.*

Writ and Proof of Service

UNITED STATES OF AMERICA, *Eastern District of Virginia,* } *ss:*

The President of the United States of America, to H. C. Carper, jailor of the county of Pulaski, Virginia, Greeting:

We command you that the body of Richard L. Fitzgerald, detained by you, and under your custody, as it is said, by whatsoever name he may be called, together with the day and cause of his being taken and detained, you have, on the second (2d) day of February, 1887, at twelve o'clock m. of said day, before the Honorable Hugh L. Bond, judge of our circuit court of the United States for the eastern district of Virginia, sitting at the United States court-house in Baltimore, Maryland, to do, submit to, and receive all and
5 singular those things which shall then and there be considered of him in this behalf.

And have you then and there this writ.

Witness the Hon. M. R. Waite, Chief Justice of the Supreme Court of the United States, at Richmond, Va., on this 29th day of January, A. D. 1887.

[Seal United States Circuit Court, Eastern District of Virginia.]

M. F. PLEASANTS, *Clerk.*

Proof of Service.

On the 31st of Jan'y, 1887, I executed the within writ of *habeas corpus* on H. A. Carper, deputy sheriff and jailer of Pulaski Co., Va., in whose custody Richard L. Fitzgerald, the petitioner, was at the time, by delivering to him in person a true copy thereof at twenty-five minutes past eight o'clock in the morning.

JNO. H. OVERBEY,
Special Deputy U. S. Marshal.

Order Allowing a New Petition to be Filed.

The petitioner is allowed to present and file a new petition *in toto*, to stand as his petition for the writ of *habeas corpus*, on account of deficiencies and imperfections in his first petition on which the writ was allowed, which he accordingly presented and filed.

Baltimore, Md., Feb'y 2, 1887.

HUGH L. BOND,
Circuit Judge.

6 *Petition Filed Pursuant to Foregoing Order.*

To the Honorable H. L. Bond, judge of the circuit court of the United States for the eastern district of Virginia:

Your petitioner, Richard L. Fitzgerald, would respectfully represent that on the 16th day of December, 1886, he tendered to the treasurer of the city of Richmond, Va., Virginia tax-receivable coupons and lawful money of the United States to the amount of one hundred dollars and 75 cents, and demanded of him a certificate in writing stating that he had deposited the same with him. That he made said tender and demanded said certificate in order that he might get out a license to sell goods by sample in the State of Virginia.

That each one of said coupons was cut from a bond issued by the State of Virginia under the provisions of an act of her General Assembly, approved March 30, 1871, entitled "An act to provide for the funding and payment of the public debt," and each one was due and past maturity, and each one bore upon its face the contract of the State of Virginia that it should be received in payment of all taxes, debts, and demands due to the State. That said treasurer refused to receive the same and refused to issue to petitioner the certificate demanded by him or any other certificate; that petitioner thereupon presented to the commissioner of the revenue for the city of Richmond copies of the two papers hereto annexed, marked "A" and "B," and demanded of him a license as a sample merchant for the State of Virginia; that said commissioner of the revenue refused to issue to your petitioner said license. That thereupon, and after said tender and said demand on said commissioner, your petitioner sold goods, wares, and merchandise, as a sample merchant, without a license, but he did not sell any or offer to sell any before he made said demand. That on the 25th day of January, 1887, he

was arrested in Pulaski county, Va., for selling goods as a sample merchant, and is now in the custody of H. A. Carper, jailer and deputy sheriff of Pulaski county, Virginia, on said charge. That he presents herewith a copy of the warrant under which he was arrested and is now held. That he made said tender and thereafter sold said goods, relying on the decision of the Supreme Court of the United States in the case of Royall *v.* Virginia, 116 U. S. R., p. 572, for his right so to do, and your petitioner charges that the officers of the State of Virginia who arrested him and who now detain him knew of said decision, and that they arrested him and now detain him to vex, harass, and intimidate him, and make him afraid to conduct his said business without license as aforesaid. That on the 20th day of January, 1887, the supreme court of appeals of Virginia made the following decision in the case of Commonwealth *v.* Jones:

Opinion by Richardson, J.

COMMONWEALTH *vs.* JONES.

This is a writ of error to a judgment of the hustings court of the city of Richmond, rendered April 7, 1886, upon an indictment against Edgar G. Jones for unlawfully selling goods, wares, and merchandise by sample, card, description, or other representation, without a license so to do. To this indictment Jones filed a special plea, setting out substantially that, being desirous of doing business in Virginia as a sample merchant, he, on the 13th of March, 1886, tendered to the treasurer of said city tax-receivable coupons cut from the bonds of the State in payment of his license tax, and demanded of the treasurer a certificate to the effect that he had deposited said coupons with him for the purpose of procuring such license. The treasurer refused to receive said coupons, and also to give the certificate demanded. Thereupon Jones made an affidavit to the above effect and presented it to the commissioner of the revenue for said city, and demanded of him the required license, which the Commissioner refused to grant. To this plea the Commonwealth filed a replication, setting up the provisions of the act of the General Assembly of March 4, 1886, and the offer of the treasurer under the provisions of that act to receive said coupons for identification and verification, and to give the certificate upon the payment of the license tax in money, or, if the defendant did not desire to pay the license tax in money, to receive the coupons for verification and identification, and upon the certificate of the proper court that the said coupons had been verified in accordance with the act of the 4th of January, 1882, then, and not till then, to issue to said defendant the said certificate in accordance with the act last aforesaid, and the act of March, 4, 1886, which the Commonwealth averred afforded the defendant a proper and constitutional remedy.

7 The defendant demurred to this replication, and the court sustained the demurrer and ordered the discharge of the defendant; and thereupon the Commonwealth obtained a writ of error.

The only question for determination here is the constitutionality

of the act of March 4, 1886. Is it inconsistent with section 10, article I, of the Constitution of the United States, which forbids "a State to pass any law impairing the obligation of contracts?"

The act in question provides that every person desiring a license to do business shall apply in writing to the commissioner of revenue with a certificate from the treasurer that he has deposited in coin, legal-tender notes, or national bank bills the amount of the assessment prescribed as a condition precedent to issuing such license: Provided, That if the applicant tenders papers purporting to be coupons detached from the State bonds issued under the act March 30, 1871, or act of March 28, 1879, to pay the assessment, then the treasurer shall receive such coupons for identification and verification, under the act of January 14, 1882, entitled "An act to prevent fraud upon the Commonwealth and her security-holders," &c.; but that no license shall be issued, and that the applicant shall have no right to do such business unless and until the coupons are verified under the act of January, 14, 1882. It further provides that no application shall be made, or, if made, shall be considered, except under this act, and that no license shall be granted unless all the requirements thereof are complied with, and prescribes the penalties for its violation.

It is contended for the defendant in error that this act of March 4, 1886, is equally repugnant to the said section of the Federal Constitution as the acts of February 7, 1884, and March 15, 1884, which were pronounced by the Supreme Court of the United States in Royall *v.* Virginia, 116 U. S., 572, void for repugnancy to said section. But we think the contention is wholly untenable and not supported by the decisions of the Supreme Court referred to. The statutes pronounced unconstitutional in Royall's case compelled the treasurer to refuse, under any circumstances, to receive State coupons in payment of license taxes, and required the same to be paid in money and nothing else. And in that case the Court said: "If a State officer, acting in obedience to a statute of the State which is in conflict with the Constitution of the United States, refuses to issue a license to a person who has duly tendered the amount, the person tendering need not take legal steps to compel the issuance of the license before doing business;" and, "if the law is unconstitutional, its unconstitutionality infects and nullifies the antecedent legislation of the State"—that is, as applicable to the case in hand, such unconstitutionality of the act of March 4, 1886, would nullify the antecedent legislation which does not allow any person to act as a sample merchant without first having obtained a license therefor, although, in the absence of such constitutionality, such a requirement is admitted to be within the power of the State.

But let us analyze and critically consider what the Supreme Court of the United States meant by the language "if a State officer refuses to issue a license to a person who has tendered the amount required by law." By its terms this sentence means, necessarily, either that the amount so tendered was tendered in money, or else, in the light of the contract, was tendered in money or in genuine tax-receivable coupons, and the amount so tendered was refused

and the license denied by an officer acting in obedience to an unconstitutional statute, then the person so tendering the amount so refused need not take legal steps to compel the issuance of the license before doing business. But not so if any of these elements are wanting—that is, if the officer, not acting in obedience to a State statute, shall wilfully refuse to receive the amount so tendered and issue such license; or, if the amount be not tendered in money, or in genuine tax-receivable coupons, but only in paper purporting to be such coupons, as to the genuineness of which the officer entertains reasonable doubts, impressed upon him by the plain terms employed by the Legislature in the preamble and in the body of the acts referred to, and the officer makes such refusal in obedience to a constitutional statute of the State, then in such case the Supreme Court of the United States did not say, or intend to say, in Royall's case, that the person tendering need not take legal steps to compel the issuance of license before doing business. The language of the Court is not fairly susceptible of any such construction as is contended for: that the highest judicial tribunal in the land could never, by the language employed, have intended to make a roving peddler of goods by sample the arbiter of the Constitution and laws of this State. It is true the Court in that case did, in effect, say that one who tenders coupons in payment of such taxes may, if they are refused, prosecute his business without a license and cannot be punished for so doing. But it would be altogether unjustifiable to impute to that Court an intention to say that one who tenders coupons, though they be coupons that may be spurious, or at least of doubtful genuineness, if they are refused to be taken as payment until they shall have been verified in accordance with the law of the State, need not take legal steps to compel the issuance of such license before doing business. The alterations of the conditions upon which the remarks of the Court in that case were based make all the difference in the world, and a difference upon which, as a pivotal point, the decision of the question arising here must turn. The question of spurious bonds and coupons is one of too grave import to this Commonwealth to be lightly brushed aside, and should not be treated with judicial incredulity.

No fact, certainly none connected with the history of Virginia State debt, is better established than that there are spurious bonds of the State out, some of which have been presented and claimed as valid and their invalidity incontestibly established. It is idle to attempt to "whistle down the wind" the existence of such spurious bonds and the absolute necessity of protection against them. Nor is it in keeping with the dignity of the judicial station, or with common fairness, to attribute to the State other and less honorable
8 motives than those declared by her Legislature. In the preamble to the act of January 14, 1882, the fact of the existence of such spurious bonds is set forth, and also the fact of the passage of the act as a necessary means of protection to both the State and her creditors.

Then, aside from all other evidences of the same facts, the Legislature of the State having thus found the facts, this court will hold

the ascertainment one not to be questioned. In view of these facts, and in view of the great importance of the subject to the State, we repeat that the Supreme Court of the United States did not say, and could not have intended to say, in Royall *v.* Virginia, that which, as applicable to the case under consideration, would be tantamount to saying that a person desiring to conduct the business of a sample merchant in this State, may, upon the bare tender of papers purporting to be tax-receivable coupons cut from the bonds of this State, without more, and though the papers thus tendered may be spurious, or the officer to whom they are tendered may honestly doubt their genuineness, take the law in his own hands and proceed to do business without first taking the legal steps necessary to compel the issuance of the license required by law. It is important to remberber in this connection that while the bonds of the State are signed by the State treasurer the signature to the coupons attached is engraved and may readily be counterfeited to an unlimited extent. This view of the subject is forcibly put by Lacy, J., in Cornwall *v.* Commonwealth, recently decided by this court, but not yet reported. If, then, the treasurer in this case acted in obedience to a State statute which is not unconstitutional, it follows that the applicant whose tender was refused cannot proceed to do business without first obtaining a license. And the same conclusion results if the applicant makes his tender only in papers of doubtful genuineness and the treasurer only refuses to accept them as payment until their genuineness shall have been verified according to law.

The Supreme Court of the United States has never said, nor can it be supposed that it will ever say, that the treasurer shall be required to accept in payment of license taxes, or of any taxes, either spurious coupons or coupons of doubtful genuineness. From the standpoint of the Supreme Court of the United States in Royall's case the demonstration of the unconstitutionality of the statutes there passed upon was an easy matter. Those statutes compel the State officer to refuse coupons in payment of license taxes under any circumstances and to receive nothing but money. That court had repeitedly held that such license assessments were taxes for revenue. Brown *v.* Maryland, 12 Wheat., 419; Ward *v.* Maryland, 12 Wall., 418; Welton *v.* Missouri, 91 United States, 275.

Both that Court and this court had held that by the terms of the act of March 30, 1871, the coupons of Virginia were made receivable for all taxes, debts, dues, and demands due the State, and that by the surrender of their old bonds and the acceptance of two-thirds of their amount in new bonds, with coupons annexed whereon was expressed such tax-receivability, constituted between the creditors of the State a contract that was irrepealable without the consent of both parties. Antoni *v.* Wright, 22 Gratt., 833; Hartmann *v.* Greenhow, 102 U. S., 672. In the case last named the Federal court held that "the right of the coupon-holder is to have his coupon received for taxes when offered," and that "any act of the State which forbids the receipt of these coupons for taxes is a violation of the contract and void as against the coupon-holder."

The conclusion, then, was irresistible that an act which compelled the treasurer, under all circumstances, to refuse to receive coupons when offered in payment of taxes, whether direct or in the form of license assessments, impairs the obligation of the coupon contract, and is unconstitutional and void. But the act of March 4, 1886, here under consideration, is wholly different. It does not forbid the treasurer to receive the coupons of the State, but only makes it his duty to withhold the certificate required as preliminary to the license until the papers purporting to be tax-receivable coupons of the State shall be verified and identified according to the act of January 14, 1882. It does not violate the obligation of the coupon contract; on the contrary, on its very face it preserves that obligation, which is to receive coupons (genuine coupons) in payment of all taxes, and for its object the act refers to the preamble of the act of January 14, 1882. In fact, the act is only the extension of the letter of the said act of 14th [of] January, 1882, to license assessments, to which, in spirit, it was already applicable. The statement in the preamble of that act must be considered as true. Antoni *v.* Greenhow, 107 U. S., 775. That act contained precisely the same features, to wit: The payment of the taxes in money, in advance, and the filing of the coupons for verification, and the sending of these coupons to the local court to have the fact of their genuineness and receivability determined, subject to an appeal to the circuit court and to this court. These features were closely scrutinized and discussed and passed on by the Supreme Court of the United States in Antoni *v.* Greenhow, *supra*, when the learned Chief Justice declares that those features did not invalidate the said act. It is true that it has been said that that decision was only to the effect that the substitution of the remedy prescribed by the act of January 14, 1882, for the remedy by mandamus was not unconstitutional. The Chief Justice did say: "The question we are now to consider is not whether, if the coupon tendered is in fact genuine, and such as ought, under the contract, to be received, and the tender is kept good, the treasurer can proceed to collect the tax by distraint or such other process as the law allows, without making himself personally responsible for any trespass he may commit, but whether the act of 1882 violates any implied obligation of the State in respect to the remedies that may be employed for the enforcement of its contract if the collector refuses to take the coupons." He then proceeds to say: "It cannot be denied that, as a general rule, laws applicable to the case, which are in force at the time and place of making a contract, enter into and form a part of the contract itself, and that this embraces alike those laws which affect its validity, construction, discharge, and enforcement.
9 (Walker *v.* Whitehead, 16 Wall., 314.) But it is equally well settled that changes in the forms of action and modes of proceeding do not amount to an impairment of the obligation of a contract if an adequate and efficacious remedy is left." He then closely investigates the terms of the fourth section of the act of January 14, 1882; considers carefully the objections presented to its material features, which have been mentioned; declares those features do not invalidate that section, and decides that that section does not im-

pair the obligation of any contract which the State has made with the holders of its interest coupons. Now, all this plainly holds good as respects the act of March 4, 1886, which is virtually the same in terms and object as the act then and there passed upon.

But the above quotation from the opinion of the Chief Justice has been made not merely to show that the material features of that act were discussed and declared unexceptionable, but also to call emphatic attention to two important points made there in reference to the statute then before the court. The first is that the Chief Justice qualified in express terms the duty of the treasurer to receive coupons in the payment of taxes by the condition that those coupons which are tendered him shall be genuine and receivable for those taxes; and, second, that the act required the payment in advance in money for the payment whereof the coupons are tendered as a condition precedent to their cancellation and the filing of the coupons and sending of them to the local courts to have the fact of their genuineness and receivability determined. This clearly evinces that in the mind of that Court the duty imposed by the statute on the treasurer to withhold the performance of the act he was called on to perform, to wit, the cancellation of the taxes in the one case and the issuance of the certificate for the license in the other, was the leading feature in the statute, and was held in the case then before that court not to be objectionable and not to invalidate the statute.

If that be true of the act of January 14, 1882, it is equally true of the act of March 4, 1886. The condition, then, upon which the Court in Royall's case held that "if a State officer acting in obedience to a statute of the State which is in conflict with the Constitution of the United States, refuses to issue a license to a person who has duly tendered the amount required by law, the person tendering need not take legal steps to compel the issuance of the license before doing business," and "may prosecute his business without a license and cannot be punished for so doing," does not exist in the case here before this court, and that decision has no bearing on and cannot govern it.

The act of March 4, 1886, does not forbid the treasurer to receive genuine coupons in payment of license taxes. It only provides that he shall resort to a certain mode to determine their genuineness and receivability, which mode requires no unreasonable delay, and pending which the applicant can at once obtain his license by the payment in advance in money of the assessment required by law, which money, if the coupons are determined to be genuine and receivable, will be refunded to him out of the State treasury. It is stated in the preamble (and the statement must be taken as true) that "there are in existence bonds which are spurious, stolen, or forged, which bonds bear coupons in the similitude of genuine coupons, receivable for all taxes, debts, and demands due the Commonwealth, and the coupons from such spurious, stolen, or forged bonds are received in payment of taxes, debts, and demands, and genuine coupons from genuine bonds, after having been received in payment of taxes, debts, and demands are fraudulently reissued." If these

facts are true, as, in the absence even of all other evidence they would be presumed to be, it was the duty of the Legislature, in order to protect the rights of the State and of her creditors, to enact a law requiring her officers to cause papers purporting to be coupons cut from the bonds of the State, to be identified and verified as genuine and receivable before taking them in the discharge of her revenue assessments. The humblest citizen is entitled to be assured of the genuineness of that which is tendered him in satisfaction of what is due him, and surely this privilege cannot be denied to the State, in whose just protection is involved the safety and well-being of every citizen.

The law of Virginia requires the obtainment of a license before any person can sell within her limits goods, wares, and merchandise by sample, card, description, or other representation. These are articles which the State has an undoubted right to tax, either directly or indirectly, by imposing a license assessment on the business of selling them. The mode for the obtainment of such license is plainly prescribed by her laws. The conditions upon which it is granted are reasonable and just, demanded by the policy of the State. Any one selling goods in this State by sample, &c., in defiance of her laws, without the required license, is guilty of a misdemeanor and punishable as provided in her statutes. Therefore the judgment of the hustings court sustaining the demurrer of the defendant to the replication of the Commonwealth to the defendant's plea to the indictment against him is erroneous and must be reversed, and the case must be remanded to the said hustings court, to be there further proceeded with in conformity with the law and views herein expressed.

That it is absurd to hold, as said court therein held, that the Supreme Court of the United States did not intend to decide that your petitioner had a right to pursue his said business after said tender without license; that the pretended distinction made by the said court of appeals was met by the Supreme Court of the United States in the case of Chaflin *v.* Taylor, 116 U. S. R., 567, wherein said Court held that it is not in the power of the State of Virginia to suspend the operation and effect of a tender of coupons for the purpose of verifying the same, but that the tender paid the tax, so as to entitle
10 the person tendering to the full benefit of a complete payment. Your petitioner now has his coupons in possession ready to surrender to the proper officer when the license is given him. Your petitioner charges that it is the purpose of the officers of the State of Virginia to start prosecutions against all persons who are doing business without license after a tender of coupons, in order that they may harass them and vex them into paying their license taxes in current money, and thus that the use of coupons may be discouraged; and that he was arrested, and that he will be prosecuted as part of said plan to vex and harass persons who are standing on their tender of coupons. That the judge of the county court of Pulaski county, Virginia, in which petitioner is being prosecuted, will be compelled to follow the decision of the supreme court of appeals in Jones' case, and thus your petitioner will be compelled to

submit to a conviction and to the expense and annoyance of an appeal to the Supreme Court of the United States to have vindicated his right to do an act which said Supreme Court has already decided that petitioner has a right to perform, petitioner, during all the time occupied by said trial and appeal to the Supreme Court, being deprived of his right to pursue his said business.

Petitioner files herewith the affidavits of Geo. S. Vashon, Jr., Wm. L. Royall, and Wm. H. Sands and A. B. Guigon, which he prays may be read as a part of this petition.

Your petitioner would respectfully show that he has been arrested under the provisions of a statute of the State of Virginia, which is section 31 of chapter 448 of the acts of 1885–'86 as modified by chapter 415 of the same acts, and that said act impairs the obligation of said State's contract contained in said coupons, and is therefore repugnant to the Constitution of the United States, and that he is therefore held in violation of the Constitution of the United States.

Your petitioner therefore prays that your honor will award him a writ of *habeas corpus*, directed to H. A. Carper, deputy sheriff and jailor of Pulaski county, Virginia, commanding him to produce the body of your petitioner before your honor, and that he may be discharged from his unlawful custody.

RICHARD L. FITZGERALD.

MARYLAND, *City of Baltimore*, } *ss:*

Personally appeared before the undersigned, this day, Richard L. Fitzgerald, who made oath that the statements contained in the foregoing petition are true to the best of his knowledge and belief.

Given under my hand this 2d day of February, 1887.

JAS. W. CHEW,
Clk U. S. Circ't Court, Dist of Md.

11 UNITED STATES OF AMERICA, *District of Maryland*, } *ss:*

I, R. Lyon Rogers, a commissioner of the United States for the district of Maryland, do hereby certify that on the 2d day of February, A. D. 1887, personally appeared before me Richard L. Fitzgerald, who, being first duly sworn by me according to law, makes oath, deposes, and says that he is the person who subscribed the foregoing petition, and that the matters and facts therein stated as of his own knowledge are true, and the matters and facts therein stated upon information and belief are true as therein stated to the best of his knowledge, information, and belief.

Given under my hand and seal, at the city of Baltimore, within the district of Maryland, this 2d day of Feb'y, A. D. 1887.

[SEAL.] R. LYON ROGERS,
U. S. Commissioner for Maryland.

12 A.

STATE OF VIRGINIA, *City of Richmond,* } *To wit:*

This day A. B. Guigon personally appeared before me, George Bryan, a notary public in and for the city aforesaid, and made oath that on the 16th day of December, 1886, he tendered for Austin, Fields & Co., to Sam'l C. Greenhow, through his deputy, S. G. Tinsley, coupons for the sum of $99.00 and $1.75, in lawful money of the United States; that the said coupons were cut from bonds of the Commonwealth of Virginia, issued under the provision of an act of her General Assembly, approved March 30th, 1871, entitled "An act to provide for the funding and payment of the public debt;" that the same were overdue and past maturity, and each bore upon its face the contract of the said State of Virginia that it should be received in payment of all taxes, debts, demands, and dues due to said State; that the said Sam'l C. Greenhow is the treasurer of the city of Richmond; that affiant made said tender for the purpose of procuring a license from December 16th, 1886, to December 16th, 1887, for said Austin, Fields & Co. as sample merchants, and at the time of said tender he demanded of said Sam'l C. Greenhow a certificate in writing stating that he had deposited said coupons and money with him for the purpose of obtaining a license to sell by sample, card, description, or representations goods, wares, & merchandise in the State of Virginia, but that the said Greenhow refused to receive said coupons and money and refused to give him the said certificate or any other certificate.

Given under my hand this 1st day of February, 1887.

GEO. BRYAN, *N. P.*

B.

To R. B. Munford, commissioner of the revenue of the city of Richmond:

We hereby make application to you for license to sell by sample, card, description, or representation goods, wares, & merchandise. We propose to do business as sample merchants. Our residence is Philadelphia, Pa. We propose to conduct said business in the city of Richmond and State of Virginia, and the amount of assessment prescribed by law as a condition precedent to issuing said license is $100, & 75c. commissioner's fee. We propose to do said business in the name of Austin, Fields & Co.

AUSTIN, FIELDS & CO.,
By A. B. GUIGON, *Att'y.*

13 *Affidavits Referred to in Foregoing Petition.*

Affidavit of Geo. S. Vashon, Jr.

STATE OF VIRGINIA, }
City of Richmond, } *ss:*

This day Geo. S. Vashon, Jr., personally appeared before the undersigned, a notary public for the city aforesaid, in the State of Virginia, and made oath that S. G. Tinsley, assistant treasurer of the city of Richmond, has, since the decision of the court of appeals in the Jones case, notified him that all drummers selling goods for non-residents, by sample, resting upon the tender of coupons as payment of their said license, would be arrested and taken in custody, and the said Tinsley has sought of him information as to the whereabouts of such drummers selling in said State; said Tinsley also informed said affiant that he, together with many other residents of this city, who tendered coupons in payment of the license required by law, would be informed against by having their names sent by him, the said Tinsley, to the grand jury for indictment as parties doing business without license, unless they would withdraw said tenders and pay the license tax in money or verified coupons. This affiant verily believes that this is the intention of said Tinsley, and that a large number of license tax-payers, both of this State and non-residents, who have tendered coupons will be compelled to pay their taxes in money or else submit to indictment and conviction for standing upon the rights of their tender. This affiant at-
14 taches hereto an advertisement of said Tinsley, which shows how the officers of the State are trying to compel payment of all licenses in money.

Given under my hand this 1st day of February, 1887.

A. W. PATTERSON, *N. P.*

Advertisement Referred to in Foregoing Affidavit.

STATE REVENUE OFFICE,
No. 13 ELEVENTH STREET,
RICHMOND, VA., *Jan.* 21, 1887.

All merchants, sample merchants, and all others who have tendered coupons for the license tax and are doing business without a license, as decided by the supreme court of appeals of Virginia, are requested to come forward and pay the same in money before their names are given to the Commonwealth's attorney for presentment.

S. G. TINSLEY,
Assistant Treasurer.

I have read over the affidavits of Geo. S. Vashon, Jr., and I make oath that substantially the same statements have been made to me by S. G. Tinsley.

WM. H. SANDS.

Subscribed and sworn to before me this 1st day of February, 1887.

A. W. PATTERSON,
Notary Public.

I have read over the affidavits of Geo. S. Vashon, Jr., and I make oath that substantially the same statements have been made to me by S. G. Tinsley.

WM. L. ROYALL.

15 Subscribed and sworn to before me this 1st day of February, 1887.

THOMAS N. CARTER,
Notary Public for the City of Richmond & State of Virginia.

And thereupon the said H. A. Carper, by his counsel, objected to the hearing on the ground that the court had no power to direct the writ to an officer of the State of Virginia returnable beyond the limits of the State; but the court overruled the objection.

Writ and Return Thereto.

EASTERN DISTRICT OF VIRGINIA, *ss:*

Circuit Court of the United States.

The President of the United States of America to H. C. Carper, jailer of the county of Pulaski and State of Virginia, Greeting:

We command you that the body of Richard L. Fitzgerald, detained by you and under your custody, as it is said, by whatsoever name he may be called, together with the day and cause of his being taken and detained, you have, on the second day of February, 1887, at 12 o'clock m. of said day, before the honorable Hugh L. Bond, judge of our circuit court of the United States
16 for the eastern district of Virginia, sitting at the United States court-house in the city of Baltimore, Maryland, to do, submit to, and receive all and singular those things which shall then and there be considered of him in this behalf.

And have you then and there this writ.

Witness the Hon. M. R. Waite, Chief Justice of the Supreme Court of the United States, at Richmond, Va., this 29th day of January, A. D. 1887.

[Seal United States Circuit Court, Eastern District of Virginia.]

M. F. PLEASANTS, *Clerk.*

Return.

To the Hon. Hugh L. Bond, judge of the circuit court of the United States for the eastern district of Virginia, sitting in the United States court-house in the city of Baltimore, Maryland:

I now produce before your honor the body of Richard L. Fitzgerald in obedience to the within writ, whom I have in my custody by virtue of a mittimus issued by John H. Cecil, a justice of Pulaski county, in the State of Virginia, a copy of which is herewith filed. I also file herewith, as part of this return, certified copies of the warrant upon which said mittimus was issued, and of the affidavit

upon which said warrant is based. I also append hereto, marked "A A," as part of this return, a certified copy of the certificate of said justice to the clerk of the county court of said county, showing that he had committed said Richard L. Fitzgerald to the jail of said county to await indictment for certain misdemeanors in said
17 certificate of commitment set forth. Wherefore I pray that this writ may be dismissed, and that the prisoner remain in my custody.

Feb'y 2nd, 1887.

H. A. CARPER,
Jailer of Pulaski County, in the State of Virginia.

Exhibits with foregoing return:

Warrant.

VIRGINIA, *To wit:*
Pulaski County,

To the sheriff or any constable of Pulaski county:

Whereas Champ S. Fitzhugh has this day complained on oath before me, John H. Cecil, a justice of said county of Pulaski, that Richard Lee Fitzgerald, on the 25th day of January, in said county, did unlawfully offer to sell and sell goods and merchandise, to wit, boots and shoes, by sample, to H. Lee Stone, a merchant of said county, without first having a license therefor; and also that the said Richard Lee Fitzgerald, on the 25th day of January, 1887, in said county of Pulaski, did unlawfully offer to sell goods and merchandise, to wit, boots and shoes, by sample, to Wm. J. Wall and Perry O. Jordan, merchants and partners transacting business in said county under the firm name and style [of] Wall and Jordon, without first having obtained a license therefor; and also that said Richard Lee Fitzgerald, on the 25th day of January, 1887, in said county, did unlawfully offer to sell goods and merchandise, to wit, boots and shoes, to T. W. Jordon, Jas. R. Jordan, and R. L. Jordan,
18 merchants and partners transacting business in said county under the firm name and style of Jordan Bros., without first having obtained a license therefor;

You are, therefore, hereby commanded, in the name of the Commonwealth of Virginia, forthwith to arrest said Richard Lee Fitzgerald and bring him before me, or some other justice of said county, to be dealt with according to law.

Given under my hand this 27th day of January, 1887.

JOHN H. CECIL, *J. P.*

Endorsed: Executed by arresting Richard Lee Fitzgerald and bringing him before Justice John H. Cecil this 27th day of January, 1887.

H. A. CARPER, *D. S. P. C.*
For WM. J. CARPER, *S. P. C.*

Endorsed: This case came on before me this day for preliminary examination. Whereupon the prisoner waived an examination,

and it is ordered that he be sent on for indictment and trial before the county court of Pulaski, at the March term thereof, and bail is required of the prisoner in the sum of $1,000.00 for his appearance before said court at said term.

Given under my hand this Jan'y 27th, 1887.

JOHN H. CECIL, *J. P.*

The prisoner having failed to give bond as required, he is ordered to jail Jan'y 27th, 1887.

JOHN H. CECIL, *J. P.*

Complaint.

VIRGINIA, } *To wit:*
Pulaski County, }

19 Champ S. Fitzhugh this day complained on oath before me, John H. Cecil, a justice of the peace of said county, that Richard Lee Fitzgerald on the 25th day of January, 1887, in said county, did unlawfully offer to sell and sell goods and merchandise, to wit, boots and shoes, by sample, to H. Lee Stone, a merchant in said county, without first having obtained a license therefor; and said Champ S. Fitzhugh also this day complained on oath before me, John H. Cecil, a justice of said county of Pulaski, as aforesaid, that the said Richard Lee Fitzgerald, on the 25th day of January, 1887, in said county, did unlawfully offer to sell goods and merchandise, to wit, boots and shoes, by sample, to Wm. J. Wall and Perry O. Jordan, merchants and partners transacting business under the firm name and style of Wall and Jordan, without first having obtained a license therefor; and said Champ S. Fitzhugh also complained on oath before me, John H. Cecil, a justice of said county of Pulaski, as aforesaid, that Richard Lee Fitzgerald, on the 25th day of January, 1887, in said county, did unlawfully offer to sell goods and merchandise, to wit, boots and shoes, by sample, to F. W. Jordan, J. R. Jordan, and R. L. Jordan, merchants and partners transacting business in the said county under the firm name and style of Jordan Bros., without first having obtained a license therefor.

Whereupon said Champ S. Fitzhugh prays that the said Richard Lee Fitzgerald may be arrested and dealt with according to law.

Jan'y 27, 1887.

C. S. FITZHUGH.

20 Sworn to by Champ S. Fitzhugh before me, John H. Cecil, a justice of Pulaski county, in the State of Virginia, this 27th day of January, 1887.

Given under my hand.

JOHN H. CECIL, *J. P.*

Mittimus.

VIRGINIA, *Pulaski County,* } *To wit:*

To H. A. Carper, deputy sheriff of said county, and to the keeper of the jail of said county:

These are to command you, the said deputy sheriff, in the name of the Commonwealth of Virginia, forthwith to convey and deliver unto the custody of the keeper of said jail, together with this warrant, the body of Richard Lee Fitzgerald, charged before me, John H. Cecil, a justice of said county, on the oath of Champ S. Fitzhugh, with misdemeanors by him committed, in this that he did, on the 25th day of January, 1887, in the said county, unlawfully offer to sell, and did sell, goods and merchandise, to wit, boots and shoes, by sample, to H. Lee Stone, a merchant in said county, without first having obtained a license therefor; and also that the said Richard Lee Fitzgerald, on the 25th day of January, 1887, in said county, did unlawfully offer to sell goods and merchandise, to wit, boots and shoes, by sample, to Wm. J. Wall and Perry O. Jordan, merchants and partners transacting business under the firm name and style of Wall & Jordan, without first having obtained a license therefor; and also that Richard Lee Fitzgerald, on the 25th day of January, 1887, in said county, did unlawfully offer to sell
21 goods and merchandise, to wit, boots and shoes, by sample, to F. W. Jordan, J. R. Jordan, and R. L. Jordan, merchants and partners transacting business in said county under the firm name and style of Jordan Bros., without first having obtained a license therefor.

And you, the keeper of said jail, are hereby required to receive the said Richard Lee Fitzgerald into your jail and custody and him there safely keep until he shall be discharged by due course of law.

Given under my hand and seal this 27th day of January, 1887.

JOHN. H. CECIL, *J. P.* [SEAL.]

Certificate of Commitment.

VIRGINIA, *Pulaski County,* } *To wit:*

To the clerk of the county court of said county:

I, John H. Cecil, a justice of the peace of the said county, do hereby certify that I have this day committed Richard Lee Fitzgerald to the jail of this county, that he may be indicted in the county court of said county for misdemeanor committed by him, in this that he did, on the 25th day of January, 1887, in said county, unlawfully offer to sell and sell to H. Lee Stone, a merchant in said county, goods and merchandise, to wit, boots and shoes, by sample, without first having obtained a license therefor; and also that he did, on the 25th day of January, 1887, in said county, unlawfully offer to sell goods and merchandise, to wit, boots and shoes, by sample, to Wm. J. Wall and Perry O. Jordan, merchants and partners transacting business under the firm name and style of Wall & Jordan,

22 without first having obtained a license therefor; and also that the said Richard Lee Fitzgerald, on the 25th day of January, 1887, in said county, did unlawfully offer to sell goods and merchandise, to wit, boots and shoes, to F. W. Jordan, J. R. Jordan, and R. L. Jordan, merchants and partners transacting business under the firm name and style of Jordan Brothers, without first having obtained a license therefor.

Given under my hand this 27th day of January, 1887.

JOHN. H. CECIL, *J. P.*

VIRGINIA:

In the clerk's office of Pulaski county, to wit:

I, Rob't D. Gardner, clerk of said court, certify that the foregoing is a true copy of the warrant, together with the officer's return thereon, the affidavit, the mittimus, and certificate to the clerk in the warrant case of the Commonwealth against Richard Lee Fitzgerald, arrested upon the charge of violating the revenue laws of the State, now on file in my said office.

Given under my hand, with the seal of said court affixed, this 31st day of January, 1887.

[Seal of County Court.]

R. D. GARDNER,
Clerk of Pulaski Co. C't, Va.

Petitioner's Demurrer to Foregoing Return.

The petitioner demurs to the aforegoing return for the reason that it does not allege matters sufficient to justify his detention.

B. T. JOHNSON,
B. S. JOHNSON,
WM. L. ROYALL,
Att'ys for Petitioner.

23 *Order Discharging Prisoner.*

H. A. Carper, jailer of Pulaski county, Virginia, in obedience to the writ of *habeas corpus* awarded on the 29th day of January, 1887, and to him directed, this day brought before me the body of the petitioner, R. L. Fitzgerald, in said writ named, and certified that the cause of detention of the said Fitzgerald would appear by the return to said writ, to which return the petitioner demurred; and, having heard and considered the argument of counsel as well on behalf of said Fitzgerald as of the attorney general of Virginia in opposition thereto, I am of opinion, for reasons filed in writing, that the said Fitzgerald is detained in the custody of the said Carper, jailer, in violation of the Constitution ot the United States, and I do order that he be discharged from the custody aforesaid.

And it is ordered that the papers in this case be filed in the circuit court of the United States at Richmond, Virginia, and that this order be recorded in said court.

Baltimore, Md., Feb'y 2d, 1887.

HUGH L. BOND,
Circuit Judge.

Order Allowing an Appeal.

This day H. A. Carper, jailer of Pulaski county, Virginia,
24 appeared before me by counsel and prayed an appeal to the Supreme Court of the United States from the judgment this day directed upon a writ of *habeas corpus* discharging from his custody the body of Richard L. Fitzgerald, which appeal is allowed upon his entering into bond payable to the United States of America in the penalty of two hundred dollars conditioned for the payment of all costs that may become due to the officers of the Supreme Court of the United States upon such appeal.

Baltimore, Md., Feb'y 2d, 1887.

HUGH L. BOND,
Circuit Judge.

Petitioner's Recognizance.

UNITED STATES OF AMERICA, *Eastern District of Virginia:*

Ex Parte RICHARD L. FITZGERALD. *Habeas Corpus.*

Be it remembered that on this second day of February, in the year 1887, before me, Hugh L. Bond, judge of the circuit court of the United States for the fourth circuit, personally appeared W. L. Royall and acknowledged himself to owe and stand justly indebted to the United States of America in the sum of two hundred dollars, to be made and levied of his lands, goods, and chattels to and for the use of the said United States of America in case Richard
25 L. Fitzgerald shall not make his personal appearance before the Supreme Court of the United States at the present term thereof to abide the decision of said court in the cause pending therein.

WM. L. ROYALL.

Teste: HUGH L. BOND,
Ct Judge.

Bond of Appellant.

Ex Parte R. L. FITZGERALD.

Know all men by these presents that we, H. A. Carper and R. A. Ayers, are held and firmly bound unto the United States of America in the sum of two hundred dollars, to be paid to the said United States of America or assigns; to which payment, well and truly to be made, we bind ourselves and each of us, jointly and severally, and each of our heirs, administrators, &c., firmly by these presents.

Sealed with our seals and dated this 2nd day of February, 1887.

Whereas H. A. Carper, jailer of Pulaski county, Virginia, hath prosecuted an appeal to the Supreme Court of the United States to reverse the judgment rendered in the above-entitled suit by the circuit court of the United States for the eastern district of Virginia:

Now, therefore, the condition of this obligation is such that if the above-bound H. A. Carper shall prosecute his said appeal to effect

and answer all damages and costs if he shall fail to make
26 good his appeal, then this obligation shall be void; otherwise, to remain in full force and virtue.

H. A. CARPER. [SEAL.]
R. A. AYERS. [SEAL.]

This bond is approved.

HUGH L. BOND,
C't Judge.

UNITED STATES OF AMERICA, } ss:
Eastern District of Virginia, }

I, M. F. Pleasants, clerk of the circuit court of the United States for the eastern district of Virginia, hereby certify *certify* that the foregoing is a true and complete transcript of the record and proceedings in the cause in the caption hereto mentioned, as the same remains on the files of my said office.

In testimony whereof I have hereunto set my hand and affixed the seal of said court, at Richmond, in said district, this fifth day of February, A. D. 1887.

[Seal United States Circuit Court, Eastern District of Virginia.]

M. F. PLEASANTS, *Clerk.*

The opinion of the court is hereto attached.

27 *Opinion of the Court.*

Ex Parte RICH'D L. FITZGERALD. *Habeas Corpus.*

BOND, *C't Judge:*

We are of opinion that the revenue laws under which this party is held, which provide for the raising of revenue in Virginia, constitute one law, though they have been enacted in separate chapters and at different times, and we are of the opinion that the act of the Legislature of Virginia, passed 1885–'86, chap. 415, which requires parties who desire to sell by sample in that State, and who tender coupons of the bonds of the State in payment of license so to sell, to deliver such coupons to the State officers for verification, and forbids them to exercise that business till the same are verified, while parties who pay their license fees in money are allowed to proceed at once in their conduct of their business, is an unconstitutional act, because it impairs the obligation of the contract made by Virginia with the coupon holder, which was that the coupons would be received in payment of all public dues and taxes. This statute in effect adds to the contract the words "after they are verified," which is a new condition altogether that greatly impairs the value of the coupon. Virginia has by law made the coupon as
28 much a legal tender for public dues and taxes as is a greenback, and it is not necessary to show what an impairment it would be to the value of the latter did its genuine character have to be proved every time it is offered in payment for a debt.

The petition in this case sets forth in detail the laws under which

the petitioner is detained and the facts which caused his arrest and imprisonment.

These allegations of the petition are not traversed or denied and must be taken as true. Taking them to be true, it fully appears, as we think, that the petitioner is held in violation of the Constitution of the United States. The case must be considered, the respondent not denying the allegations of the petition, as if those alleged facts were in the return and that the return itself stated that the party was held for the reasons and under the circumstances alleged, as well in the petition as in the return proper.

We have concluded to determine this case immediately without further consideration that it may go, if the Virginia authorities so determine, to the Supreme Court at once that an early de-
29 cision of that tribunal may prevent further illegal arrests of a like character if this case should be decided so to be.

In *Ex Parte* Royall, 107 U. S., 251, the Supreme Court say that while the circuit court has the power to do so and may discharge the accused in advance of his trial, it is not bound to do so in every case; but in this case if the party be not discharged immediately the damage to him will be very great, if not irreparable. He will lose his whole year's business & his rivals in trade will supplant him in the good will of his customers.

We think the party should be discharged, and an order will be made accordingly.

Endorsed on cover: E. Virginia C. C. U. S. No. 1341. H. A. Carper, jailer of Pulaski county, Virginia, appellant, vs. Richard L. Fitzgerald. Filed February 7, 1887.

121-87

IN THE

Supreme Court of the United States.

H. A. CARPER
vs.
RICHARD L. FITZGERALD. } No. 1241.

BRIEF OF R. A. AYERS, ATTORNEY-GENERAL OF VIRGINIA, FOR PLAINTIFF IN ERROR.

IN THE

Supreme Court of the United States.

H. A. CARPER
vs.
RICHARD L. FITZGERALD. } No. 1341.

BRIEF OF R. A. AYERS, ATTORNEY-GENERAL OF VIRGINIA, FOR PLAINTIFF IN ERROR.

STATEMENT.

This is an appeal from the final decision of the Honorable Hugh L. Bond, judge of the fourth circuit, discharging the defendant in error from imprisonment, upon the hearing of the return to a writ of *habeas corpus* issued upon his petition to plaintiff in error as jailor of Pulaski county, in the State of Virginia.

The revenue laws of the State of Virginia impose a license tax of one hundred dollars upon any person who sells or offers to sell any description of goods, wares, and merchandise, by sample, card, description or other representation. It is further therein provided that any person or persons who shall sell or offer to sell in violation of the act, shall pay a fine of five hundred dollars for the first offence, and six hundred dollars for each succeeding offence.*

*The sections of the acts recited are as follows:

Acts 1883-4, section 30, chapter 450, page 578, approved March 3d, 1884.

Sample Merchants.

30. *Any person who shall sell or offer to sell, any description of goods, wares, or merchandise by sample, card, description, or other representation, verbal or otherwise, or any*

The defendant in error, a sample merchant, representing the house of *Austin, Fields & Co.* of the city of Philadelphia, offered for sale

agent for the sale or collection of orders by sample or description list, such as is furnished by the C. O. D. Supply Company of America, or any similiar company of America, or any similar company, shall be deemed to be a sample merchant. It shall not be lawful for any person or persons to sell or to offer to sell, any description of goods, wares, or merchandise, without first having obtained a license therefor from the auditor of public of accounts, or from a commissioner of the revenue of some county or corporation, which license shall grant the privilege to sell anywhere in the State, and shall be valid one year from the date of its issue; but if used out of the county or corporation where granted, the clerk of the court of such county or corporation shall certify thereon, with the seal of the court affixed, that the officer signing the said license is really the commissioner of the revenue for the district wherein the license issued, and that his signature is believed to be genuine: provided that it shall not be lawful for the clerk of any county or corporation to furnish any certificate relating to the grant of a license other than in the manner authorized and directed by this section. Such license, thus obtained, shall be a personal privilege, and shall not be transferable, nor any abatement of the sum required to be paid therefor be allowed. No county, city, or town shall have the right to require a license of sample merchants. ANY PERSON OR PERSONS WHO SHALL SELL OR OFFER TO SELL IN VIOLATION OF CHAPTER ONE OF THIS ACT, SHALL PAY A FINE OF FIVE HUNDRED DOLLARS FOR THE FIRST OFFENCE, AND SIX HUNDRED DOLLARS FOR EACH SUCCEEDING OFFENCE, THE INFORMER TO RECEIVE ONE-HALF OF THE FINE SO COLLECTED. Nothing in this section shall be construed to allow sample merchants to sell to any person other than a manufacturer or licensed merchant, or keeper of an ordinary eating house, without taking out the additional license required of merchants: nor shall anything in this section be construed to allow any manufacturer to sell by sample any goods, wares, or merchandise unless he shall have been assessed and taxed on the capital invested as provided in fourth classification, schedule C, of chapter one of this act, or shall take out the license required of sample merchants, as provided in section thirty-one of chapter one of this act.

Acts 1885-6, chapter 148, section 31, page 508, approved March 6, 1886.

Sample Merchants' Licenses.

31. *For the privilege of selling by sample, card, description, or other representation, any person, firm, or corporation, in order to obtain the right to exercise the same, shall pay one hundred dollars; and any sample merchant who shall permit any person except a duly authorized agent or salesman to sell under his license, otherwise than for his exclusive use and benefit, shall pay a fine of five hundred dollars for each offence. No agent or salesman shall be permitted to sell or offer to sell as aforesaid, except he have with him at the time the license granted to the person for whom he acts, and a duly executed power of attorney from said person constituting him his agent or salesman. For every agent or salesman employed to sell as aforesaid, by any person, firm, or corporation, there shall be paid one hundred dollars, in order to obtain the privilege aforesaid; and no agent or salesman shall be permitted to sell or offer to sell as aforesaid, except he have with him at the time a certificate from the auditor of public accounts, or the commissioner of the revenue issuing the license, that the license to the person for whom he acts has been granted, which certificate*

goods, wares and merchandise, by sample, in the county of Pulaski, Virginia, without having first obtained a license as required by law.

Complaint, in writing, under oath, was made against him to a justice of the peace of said county, who issued a warrant in due form of law, charging the defendant in error with selling goods by sample without license. Under this warrant the defendant in error was duly arrested and taken before the justice to be examined for the offence. He waived his examination and in default of bail for his appearance to answer an indictment, was committed to jail. He thereupon presented a petition to the circuit judge for a writ of *habeas corpus*, in which he represented that prior to having sold, or offered for sale any goods or merchandise, viz: on the 16th day of

shall also state the name of the person or firm to whom the license was granted, and the name of the agent or salesman using the same; and such certificate and power of attorney shall be exhibited whenever required by any officer of the law or private citizen. Sales of wine, ardent spirits, malt liquors, cider, or any mixture of any of them, by sample, shall be limited to sales by wholesale, and any person who desires to sell wine, ardent spirits, malt liquors, cider, or any mixture of them, by sample, may do so upon paying the same amount that is required to be paid by the wholesale liquor merchant. This section shall not be so construed as to prevent any planter from selling all tobacco raised by himself, by sample or otherwise. Nothing in this or the preceding section shall be construed to require any licensed merchant, who has paid for his merchants' license an amount of not less than one hundred dollars, to pay an additional amount for selling or offering to sell by sample, either by himself or agents; but before any merchant shall be authorized to sell either by himself or his agents, he shall obtain a certificate from the commissioner of the revenue of the county or corporation in which he is licensed, showing that he is conducting a bona fide mercantile business in such county or corporation, and has not taken out a merchants' license to avoid the payment of the assessment on sample merchants; and no county, city, or town other than that in which such merchant has his place of business, shall impose any license tax upon such merchant for selling by sample; and any sample merchant who shall hire his license to another, or allow the use of the same to any other person, firm, or corporation shall forfeit such license; and the person, firm, or corporation using such license shall pay a fine of two hundred and fifty dollars for each offence; and any person, firm, or corporation who may be found using a license not granted by the officers authorized by chapter one of this act to issue such license; and any person, firm, or corporation using any such license in this State, and which is ascertained to be fraudulent, such person, firm, or corporation shall be deemed guilty of a misdemeanor, and on conviction, shall be fined two hundred and fifty dollars and imprisoned for one year: and provided further, that this section shall apply alike to resident and non-resident sample merchants: provided, however, that any manufacturer who shall have been assessed, and paid on the capital employed in his business, as provided in schedule C of this act, shall not be required to pay an additional sum for sale by sample.

December, 1886, he tendered to Samuel C. Greenhow, treasurer of the city of Richmond, $99 in coupons cut from bonds of the State, issued under the funding act of 1871, and $1 50 in lawful money of the United States, and demanded of him a certificate in writing that he had deposited the coupons and money with him for the purpose of obtaining a license to sell goods by sample in the State of Virginia for *Austin, Fields & Co.* That the treasurer refused to receive the coupons, and refused him the certificate. That he then presented to the commissioner of the revenue for said city an affidavit of said tender and refusal of certificate, and demanded of him a license as a sample merchant. That after said tender and demand for license, petitioner sold goods by sample without license, and not before. That on the 20th day of January, 1887, he was arrested for selling goods as a sample merchant without license. That the court in the case of Royall vs. Virginia, 116 U. S., p. 572, had affirmed his right to tender coupons of the State in payment of his license tax, and pursue his business, after they had been refused, without license. That the acts of the general assembly of Virginia under which he was arrested, section 31 of chapter 448, of the Acts of 1885–6, as modified by chapter 415 of the same Acts * impairs the obligation of the State's contract contained in the coupon, and is therefore repugnant to the constitution of the United States.

*The following is the chapter referred to above:

CHAP. 415.—An ACT to prevent frauds upon the commonwealth and the holders of her securities in the collection and disbursement of revenues, and to repeal section 112 of an Act approved March 15, 1884, entitled an Act to provide for the assessment of taxes, &c., and to repeal an Act approved February 7, 1884; entitled an Act to regulate the granting of licenses; and to repeal an Act approved February 25, 1884, entitled an Act to regulate granting of licenses, &c.

Approved March 4, 1886.

§ 1. Be it enacted by the general assembly of Virginia, That every person or firm, partnership or association, express, telegraph, telephone and every incorporated company which now is or may be required to obtain a license in order to do business in this State, desiring to obtain such license, shall make application therefor in writing to the commissioner of the revenue of the county or corporation wherein such business is proposed to be conducted, or to the auditor of public accounts in such cases as he is authorized by law to issue a license, in which application it shall be stated the nature of the business, the residence of the applicant, the place where it is proposed to conduct such business, the amount of the assessment prescribed by law as a condition precedent to the issuing such license, accompanied by the certificate in writing by the treasurer of the county or corporation

That the act under which he is held does not differ in principle from the act in force, and which regulated the granting of licenses

wherein such business is proposed to be conducted, stating what amount in coin, legal-tender notes, or national-bank bills has been deposited with him by said applicant: provided, however, in such cases as the auditor of public accounts is authorized by law to issue license, such deposit as herein provided for, shall be made with him at the time such application is presented, instead of with the treasurer: provided, that if such applicant shall make tender of any papers or instruments in print, writing, or engraving, purporting to be coupons detached from bonds of the commonwealth issued under the act approved thirtieth day of March, eighteen hundred and seventy-one, entitled an act to fund the public debt, or under the act approved March twenty-eighth, eighteen hundred and seventy-nine, entitled an act to provide a plan of settlement of the public debt, in payment of any such assessment prescribed by law, the treasurer or auditor, as the case may be, to whom such tender is made, shall receive such coupons for identification and verification in accordance with the provisions of act of assembly approved January fourteenth, eighteen hundred and eighty-two, entitled an act to prevent frauds upon the commonwealth and the holders of the securities in the collection and disbursement of the revenues. But no license shall issue, nor shall the applicant therefor have the right to conduct any business or pursue any profession, trade, or calling for which such license is required by law, unless and until the said coupons shall have been verified in the manner prescribed by said act of fourteenth January, eighteen hundred and eighty-two.

§ 2. Upon the receipt by the commissioner of the revenue or auditor as the case may be, of an application of a person or firm, partnership or company, who has complied with the foregoing section, he shall endorse said application as follows: "I find the within application correct, and in due form, and accompanied with the certificate in writing of the treasurer of the county or corporation, that the sum of ——— dollars in gold or silver coin, or United States treasury, or national bank notes, has been deposited with the said treasurer, or that coupons have been tendered by the applicant and verified as required by the first section of this act, or that the same accompanied the application, and was deposited with the auditor," (*as the case may be*) to which endorsement he shall sign his name and file said application in his office, furnishing the applicant with a duplicate copy of the same. If it shall appear that all the provisions of this act have been complied with, then the court or person having authority to grant or issue such license, may hear the application, and if in due form, may grant such license, provided that in case such license shall be refused, such refusal shall be entered upon such application, and the same returned to the applicants, who upon presenting such application, endorsed with such refusal, to the officer with whom the deposit was made, shall have the same returned to him by the said officer.

§ 4. No application for a license to do business, or to follow any profession, trade, or calling in the State, shall be made, and if made, shall not be considered, except in pursuance of this act; and no such license shall be granted unless all the requirements of this act shall have been first complied with; and any license granted or obtained in violation of the provisions of this act, shall be null and void, and the person or persons, firm or association, joint stock or incorporated company, which may obtain such license, and attempt to do business thereunder,

when the case of Royall vs. Virginia, supra, was decided. That, notwithstanding the decision of this court in that case, the supreme court of appeals of Virginia, at the January term, 1887, in the case of The Commonwealth vs. Jones, has decided the act under which he is held to be constitutional and valid; that the county court of Pulaski county, in which he is held for trial, will be compelled to follow the decision of the supreme court of appeals of Virginia; and, unless discharged, he will be compelled to submit to a conviction, and to the expense and annoyance of an appeal to this court. Upon this petition a writ of *habeas corpus* was issued to the plaintiff in error, returnable in the city of Baltimore, Maryland, before the Hon. Hugh L. Bond, circuit judge.

The plaintiff in error first objected to the hearing on the ground that the court had no power to direct the writ to an officer of the State of Virginia returnable beyond the limits of the State of Virginia, which was overruled, and he then made return to the writ that the defendant was held by him pursuant to commitment of the said justice to answer an indictment for selling goods by sample without license. The said return set out in full not only the mittimus, but the complaint, the warrant of the justice, the officer's

shall be deemed to violate the law, and shall be liable to all the forfeitures, pains and penalties for such violation in the same manner as if no such license had been obtained, and in addition thereto, fined not less than fifty dollars nor more than five hundred dollars.

2. Any assessor, treasurer, or other officer charged with any duty pertaining to the granting of licenses, who shall violate this act, shall be guilty of a misdemeanor, and upon conviction thereof shall be fined not less than fifty nor more than five hundred dollars.

3. The auditor of public accounts shall forthwith have prepared and furnished to commissioners of the revenue of this state, blank forms of applications for licenses required to be made in writing by this act.

4. Section one hundred and twelve of an act approved March fifteenth, eighteen hundred and eighty-four, entitled an act to provide for the assessment of taxes on persons, property, and income, and imposing taxes thereon for the support of the government and public free schools, and to pay the interest on the public debt, and to provide for the mode of applying for license to transact any business in this state, and prescribing the amount to be paid as a condition precedent to the right to transact such business; and an act entitled an act to regulate the granting of licenses for the exercise of any privilege, approved February seventh, eighteen hundred and eighty-four; and an act entitled an act to amend and re-enact sections one and two of an act entitled an act to regulate the granting of license for the exercise of any privilege, approved twenty-fifth February, eighteen hundred and eighty-four, are hereby repealed.

5. This act shall be in force from its passage.

return of the arrest, the order of the justice sending defendant on to answer indictment, and the certificate to the clerk of the court; all being regular and in conformity to law. See record, folio 14.

To this return the defendant in error demurred, and the judge sustained the demurrer and discharged him.

From the final decision of said judge the plaintiff in error prayed an appeal, which was granted, and he now assigns the following errors for which the decision should be reversed:

The order of the circuit judge in discharging the defendant in error from imprisonment was erroneous.

First—Because the circuit judge had no jurisdiction to award the writ to an officer of the State of Virginia returnable in the State of Maryland, nor to hear and decide the case there.

Second—Because it was error to hold that "the case must be considered, the respondent not denying the allegations of the petition, as if those alleged facts were in the return, and that the return itself stated that the party was held for the reasons and under the circumstances alleged, as well in the petition as in the return proper."

Third—Because the demurrer to the return admitted the facts therein set forth to be true, from which it appeared that the prisoner was held by "due process of law," and was not illegally restrained of his liberty.

Fourth—Because the county court of Pulaski county, Virginia, was a court of competent jurisdiction to try the defendant in error for the offence with which he was charged.

Fifth—Because the revenue laws of the State of Virginia under which the defendant in error was held, are valid, and not repugnant to the constitution and laws of the United States.

ARGUMENT.

The first point, as to the jurisdiction of the circuit judge to award the writ returnable beyond the State and to try the case there, has never been directly passed upon by this court. The only case bearing upon the subject directly, is that of *ex parte* Clarke, 100 U. S., 399. In that case Mr. Justice Strong allowed the writ directed to a United States marshal in the State of Ohio, returnable before him at the Catskill Mountain House in the State of New York, and adjourned the hearing into the supreme court of the United States. In deciding the case, the court said: "A justice of this court can

exercise the power of issuing the writ of *habeas corpus* in any part of the United States where he happens to be," and it was under the authority of this decision that the honorable circuit judge made the writ returnable in the city of Baltimore, where he then " happened to be." It is true the city of Baltimore is in the Fourth circuit, but the circumstances of the case are different from one in which the writ is directed to a marshal of the United States.

In this case the writ was directed to an officer of the State of Virginia, whose authority to detain the prisoner under the mittimus ceased when he went beyond the limits of the State.

It may, and doubtless will, be answered that the writ was a sufficient warrant for the detention of the prisoner, and fully protected the officer, but this is by no means clear. There is always a judge of the United States present in the State, with full authority to grant the writ and discharge the prisoner in a proper case, and there can be no reason why application should not be made to this judge, without the expense and trouble of taking the prisoner beyond the State.

The statute gives the several justices and judges of the United States courts within their respective jurisdictions, the power to grant writs of *habeas corpus*, and it was never contemplated that parties should be taken beyond the territorial limits of the circuit court for the district in which they are held. There is in each district a judge fully competent to act, and vested with all the authority the circuit judge can exercise, and it is but fair construction to assume that Congress intended to restrict the meaning of the language used, so as to compel the parties to apply to the district judge in the absence of the circuit judge from the district or districts composing the circuit court within which they are held.

The ruling of the honorable circuit judge as to the effect of the demurrer to the return is unprecedented, and wholly unsupported by authority. The learned judge in his opinion used the following language: " The petition in this case sets forth in detail the laws under which the petitioner is detained and the facts which caused his arrest and imprisonment.

" These allegations of the petition are not traversed or denied, and must be taken as true. Taking them to be true, it fully appears, as we think, that the petitioner is held in violation of the constitution of the United States. The case must be considered, the respondent not denying the allegation of the petition, as if those alleged facts

were in the return and that the return itself stated that the party was held for the reasons and under the circumstances alleged, as well in the petition as in the return proper."

Section 760 of the Revised Statutes provides that "the petitioner or the party imprisoned or restrained may deny any of the facts set forth in the return, or may allege any other facts that may be material in the case. Said denials or allegations shall be under oath. The return and all suggestions made against it may be amended, by leave of the court, or justice or judge, before or after the same are filed, so that thereby the material facts may be ascertained."

The petitioner chose to demur to the return of the jailer, and did not deny them or allege any other facts in opposition thereto. It would seem useless to argue to this court the effect of the demurrer to the return. The demurrer certainly admitted the facts set forth in the return, and an issue of law was thereupon joined as to their sufficiency to warrant the imprisonment and further detention of the prisoner. Hovey and wife vs. Morris, 7 Black, p. 559. Watson's case, 36 Eng. C. L., 254. In the latter case, after the return was filed, the counsel for the prisoner moved the court to discharge him from imprisonment, and the court said: "We are now to pronounce our judgment on the validity of a return to a writ of *habeas corpus*. * * * * * * The return must necessarily be received as true in all the particulars that appear upon it in the present stage, in which its sufficiency alone is examined. We are sitting as on a demurrer, or a writ of error on the judgment of another court."

It may be contended on the part of the defendant in error that his petition for the writ, being sworn to, was an affidavit, and proper to be considered by the court in arriving at a conclusion, but such an argument as that can have no force. The petition is sworn to in order that the court may have some assurance of the *bona fides* of the application. This petition is for the purpose of obtaining the writ, and its averments cannot be considered as evidence.

When the return was filed, the petitioner had the choice of two methods of procedure. He could have denied any of the facts in the return, or alleged any other facts that he conceived to be material in opposition to the facts recited in the return, and thereby have raised an issue of fact to be decided by the court on hearing the testimony and arguments adduced by him or the jailer; or he could have objected to the sufficiency of the return upon demurrer, or

have moved the court to discharge him, either of which presented a question of law for the court to decide.

He demurred to the return, and thereby admitted the facts and presented the question for decision. Are the facts stated in the return sufficient in law to authorize the imprisonment?

This involves an examination of the return and the authority of the magistrate who issued the warrant of commitment, and the authority of the officer who held the petitioner.

The return of the jailor sets forth in full the complaint under oath to the justice, charging *that the defendant in error did unlawfully offer to sell, and sell goods and merchandise, to-wit: boots and shoes, by sample, to H. Lee Stone, a merchant in said county (Pulaski), without first having obtained a license therefor;* and also charged other sales to other parties. Record, folio 16. The warrant of arrest issued by the justice pursuant to said complaint, charging said offence, directed to the sheriff or any constable of the county; the return of the sheriff on said warrant, showing that he had executed it by arresting the defendant in error (Record, folio 15); the order of the justice endorsed on the warrant, showing that upon the hearing the prisoner waived an examination, and was sent on to answer an indictment, bail being required in the sum of one thousand dollars, in default of which he was ordered to jail; the *mittimus* directing the sheriff to convey him to jail, and the jailer to receive him therein, (Record, folio 17,) and the certificate of the justice to the clerk of the county court, certifying that he had committed the defendant in error to answer an indictment for the offence (Record, folio 17), all of which was regularly certified under the seal of the county court of Pulaski county, and by the return of the plaintiff in error, as jailer of said county. The justice was authorized to issue and try the warrant. Chap. 14 Criminal Code, Acts of the General Assembly of Virginia 1877–8, p. 329. Do the facts set forth in the return justify the imprisonment? The statute *ubi supra* provides that "*it shall not be lawful for any person or persons to sell, or offer to sell, any description of goods, wares, or merchandise, without first having obtained a license therefor from the auditor of public accounts, or from a commissioner of the revenue of some county or corporation.*" The same section of the act recited, further provides that "*any person or persons who shall sell, or offer to sell, in violation of chapter one of this act, shall pay a fine of five hundred dollars for the first offence, and six hundred dollars for each succeeding offence.*"

The section recited is part of chapter one referred to. The justice had jurisdiction to issue the warrant and commit the prisoner. It cannot, therefore, be denied that the complaint, warrant, order, mittimus and other proceedings had and taken before the justice were regular, and in strict accordance with the requirements of the act recited.

The statute provided that if he sold, or offered to sell, without license, he should pay a fine. The complaint, warrant and mittimus each recited that he had sold and offered to sell without license.

That the return shows the defendant in error to be guilty of an offence seems to be conclusive, but the learned circuit judge, seeing the force of this argument, uses the following language: "We are of opinion that the revenue laws under which this party is held, which provide for the raising of revenue in Virginia, constitute one law, though they have been enacted in separate chapters and at different times, and we are of the opinion that the act of the Legislature of Virginia, passed 1885–6, chap. 415, which requires parties who desire to sell by sample in that State, and who tender coupons of the bonds of the State in payment of license so to sell, to deliver such coupons to the State officers for verification, and forbids them to exercise that business till the same are verified, while parties who pay their license fees in money are allowed to proceed at once in the conduct of their business, is an unconstitutional act, because it impairs the obligation of the contract made by Virginia with the coupon holder, which was that the coupons would be received in payment of all public dues and taxes. This statute in effect adds to the contract, the words 'after they are verified,' which is a new condition altogether, that greatly impairs the value of the coupon."

But this does not meet the argument in this case; the question here is as to the sufficiency of the return. If the court could hold that upon the demurrer to the return all the facts alleged in the petition were admitted to be true, the reasoning would have some force; but in the attitude in which this case was presented, it has no applicability. So far as the legitimate consideration of the questions arising in this case are concerned, it must be considered without reference to any tender of coupons. There has been no such issue properly presented for the decision of the court or judge, and no such issue has been properly decided. The forms of procedure as preserved in approved precedents are the best evidence of what the law is, and the fact that the action of the judge is without pre-

cedent, in the absence of anything else, should go far toward proving it to be erroneous. The admission of any evidence whatever to contradict the facts recited in the return, was for a long time a mooted question in the English courts, and it was only after much argument and in cases where great hardship would ensue, that evidence of this character was finally allowed, the party being generally left to his action for a false return. Hurd on Habeas Corpus, p. 263, *et seq.*, and cases cited.

It was evidently the intention of Congress in enacting section 760 of the Revised Statutes to make plain the right of the petitioner to deny the return, and allege other facts in opposition thereto, which was uncertain under the common law practice. But it never could have been the intention to establish an entirely new and unheard of practice, under which it should become the duty of the person to whom the writ of *habeas corpus* was directed, to traverse the averments of the petition in the return. That no such construction can be placed upon the statute, seems manifest from its very words, which particularly give the petitioner the right to *deny any of the facts set forth, or allege any other facts* that may be material.

Some notice certainly should be given the officer that the facts in his return are denied, or that other facts are alleged. He may be ready with evidence at hand to prove the truth of his return or disprove the facts alleged in opposition thereto. No such notice is certainly given by a demurrer. The statute provides that the testimony shall be heard, and it certainly never could have been contemplated by the framers of the law that a court or judge would, upon a demurrer to the return, decide the case upon the facts set forth in the ex parte affidavit to a petition required as an evidence of good faith and basis upon which to issue the writ.

It is not claimed that the statutes of Virginia complained of are void upon their face or invalid, except in the case of a tender of coupons in payment of license tax. The laws are not, therefore, void, and whether they in the particular instance work a violation of a right guaranteed by the constitution of the United States depends upon a question of fact, which should be ascertained by a jury in a court of competent jurisdiction. When the questions of fact have been determined, if errors are committed in applying the law governing these facts, they should be revised in an appropriate manner. It never could have been intended that the court should try the guilt or innocence of a prisoner upon a writ of *habeas corpus*.

Under the laws of Virginia, the county courts have jurisdiction of all presentments, informations and indictments for misdemeanors.

The justice had committed the defendant in error to answer an indictment in the county court, which he was lawfully authorized to do as before stated. The defendant in error was, therefore, held for trial in a court of competent jurisdiction upon an indictment under a valid statute. He sought to be discharged, because he claimed to be able to prove matters of fact, which in the application of the statute in his particular case rendered it inoperative as violating a right guaranteed to him by the constitution of the United States.

The questions involved in this case seem to be identical in almost every particular with those decided in the case of ex parte Crouch, 112 U. S. 178. In that case, which was a motion for leave to file a petition for a writ of *habeas corpus*, Chief Justice Waite, delivering the opinion of the court, said:

"This petition is denied. The general revenue law of Virginia provides that no person shall do business in the State as a sample merchant until he has obtained a license therefor, on payment of a tax of $75; and that if he does, he shall pay a fine of $500 for the first offence, and $600 for each succeeding offence. Acts of Virginia 1884, ch. 445, sections 30 and 31, pp. 578–9. The petitioner has been informed against and is now held in custody for trial by order of the hustings court of the city of Richmond for a violation of this law. According to the statements in the petition presented to us, the defence of the petitioner upon the trial of that case will be a tender by him before commencing business, to the proper revenue officers of the State, of the amount of the required license tax in coupons cut from State bonds, which the State when it issued the bonds, agreed should be receivable in payment of all State dues; and the refusal of the officer to accept the tender and give a proper certificate therefor, because, by a statute enacted after the issue of the bonds, the tax-receiving officer was prohibited from taking the coupons for this tax. The right of the petitioner to a writ of *habeas corpus* from this court is put in the petition on the ground that the petitioner is detained in custody by the State court, in violation of the constitution of the United States, because the statute which prohibits the officer from accepting the coupons, impairs the obligation of the contract of the State to receive them, and is on that account inoperative and void, by reason of the provisions of the constitution which precludes the States from passing such laws.

"It is not claimed that the law which imposes the tax and fixes the penalty for doing business without its payment, is unconstitutional. Neither is it pretended that the hustings court has not

plenary jurisdiction for the trial of persons charged with a violation of the law.

"The petitioner is, therefore, in the custody of a State court of competent jurisdiction, and held for trial upon an information for violating a criminal statute of the State. He seeks to be discharged by *habeas corpus*, not because, if guilty of the charge which has been made against him, the court is without jurisdiction to hold him for trial, and to convict and sentence him, but because, as he alleges, he has a valid defence to the charge, which grows out of a provision in the constitution of the United States, and, for this reason, he insists he is detained in violation of the constitution. It is elementary learning, that if a prisoner is in the custody of a State court of competent jurisdiction, not illegally asserted, he cannot be taken from that jurisdiction and discharged on *habeas corpus* issued by a court of the United States simply because he is not guilty of the offence for which he is held. All questions which may arise in the orderly course of the proceedings against him are to be determined by the court to whose jurisdiction he has been subjected, and no other court is authorized to interfere to prevent it. Here the right of the prisoner to a discharge depends alone on the sufficiency of his defence to the information under which he is held. Whether his defence is sufficient or not, is for the court which tries him to determine. If in this determination errors are committed, they can only be corrected in an appropriate form of proceeding for that purpose. The office of a writ of *habeas corpus* is neither to correct such errors, nor to take the prisoner away from the court which holds him for trial, for fear, if he remains, they may be committed. Authorities to this effect in our own reports are numerous." *Ex parte Watkins*, 3 Pet. 202; *ex parte Lange*, 18 Wall. 163, 166; *ex parte Parks*, 92 U. S. 18, 23; *ex parte Siebold*, 100 U. S. 371, 374; *ex parte Virginia*, Id. 339, 343; *ex parte Rowland*, 104 U. S. 604, 612; *ex parte Curtis*, 106 U. S. 371, 375; *ex parte Yarbrough*, 110 U. S. 651, 653.

There is no distinction between the two cases, the principles involved are the same. This court has, in the line of decisions cited by the Chief Justice, in the above case settled very clearly the grounds upon which relief should be granted upon *habeas corpus*.

It has invariably been decided that where a prisoner is held for trial under a valid statute by a court of competent jurisdiction, he cannot be discharged upon *habeas corpus*, but must be remanded. In ex parte Parks, 93 U. S. 23, Mr. Justice Bradley very fully reviews the whole question, and lays down clearly the principles which should govern in the decision of such cases, as follows:

"Whether an act charged in an indictment is or is not a crime by the law which the court administers (in this case the statute law

of the United States), is a question which has to be met at almost every stage of criminal proceedings—on motions to quash the indictment, on demurrers, on motion to arrest judgment, &c. The court may err, but it has jurisdiction of the question. If it errs, there is no remedy after final judgment, unless a writ of error lies to some superior court, and no such writ lies in this case.

"It would be an assumption of authority for this court, by means of the writ of *habeas corpus*, to review every case in which the defendant attempts to controvert the criminality of the offence charged in the indictment. It having been held that the regulation of the appellate power of this court was conferred upon Congress, and Congress having given an appeal or writ of error in only certain specified cases, the application is irresistible that those errors and irregularities, which can only be reviewed by appeal or writ of error, cannot be reviewed in this court in any other cases than those in which those processes are given. Now, it has always been held that a mere error in point of law committed by a court in a case properly subject to its cognizance, can only be reviewed by the ordinary methods of appeal or writ of error; but that where the proceedings are not only erroneous, but entirely void, as where the court is without jurisdiction of the person or of the cause, and a party is subjected to illegal imprisonment in consequence, the superior court, or judge invested with the prerogative power of issuing a *habeas corpus*, may review the proceedings by that writ, and discharge from illegal imprisonment. This is one of the modes in which the court exercises supervisory power over inferior courts and tribunals; but it is a special mode, and confined to a limited class of cases.

"The general principles upon which the writ of *habeas corpus* is issued in England were well settled by usage and statutes long before the period of our national independence, and must have been in the mind of Congress when the power to issue the writ was given to the courts and judges of the United States. These principles, subject to the limitations imposed by the Federal constitution and laws, are to be referred to for our guidance on the subject. A brief reference to the principal authorities will suffice on this occasion.

"Lord Coke, before the *habeas corpus* act was passed, excepted from the privilege of the writ, persons imprisoned upon conviction of a crime, or in execution. 2 Inst. 52; Com. Dig., Hab. Corp., B.

"The *Habeas Corpus* Act itself excepts those committed or detained for treason or felony plainly expressed in the warrant, and persons convict, or in execution by legal process. Com. Dig., Hab. Corp., B. Lord Hale says: 'If it appear by the return of the writ that the party be wrongfully committed, or by one that hath not jurisdiction, or for a cause for which a man ought not to be imprisoned, he shall be discharged or bailed.' 2 Hale, H. P. C., 144.

"Chief Baron Gilbert says: 'If the commitment be against law, as being made by one who hath no jurisdiction of the cause, or of a matter for which by law no man ought to be punished, the court are to discharge.' Bac. Abr., Hab. Corp., B. 10.

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"Chief Baron Gilbert says: 'If the commitment be against law, as being made by one who hath no jurisdiction of the cause, or of a matter for which by law no man ought to be punished, the court are to discharge.' Bac. Abr., Hab. Corp., B. 10.

"These extracts are sufficient to show that when a person is convict, or in execution by legal process issued by a court of competent jurisdiction, no relief can be had. Of course a superior court will interfere if the inferior court had exceeded its jurisdiction, or was not competent to act. * * * * *

"From this review of the law, it is apparent, therefore, as before suggested, that in a case like the present, where the prisoner is in execution upon a conviction, the writ ought not to be issued, or if issued the prisoner should at once be remanded, if the court below had jurisdiction of the offence, and did not act beyond the powers conferred upon it. The court will look into the proceedings so far as to determine this question. If it finds that the court below has transcended its power, it will grant the writ and discharge the prisoner, even after judgment. *Ex parte* Kearney, 7 Wheat. 38; *ex parte* Wells, 18 How. 307; *ex parte* Lange, 18 Wall. 163. But if the court had jurisdiction and power to convict and sentence, the writ cannot issue to correct a mere error. We have shown that the court below had power to determine the question before it; and that this is so, is further manifest from the language of Chief Justice Marshall in the case of *Tobias Watkins*, 3 Pet. 203. He there says: 'To determine whether the offence charged in the indictment be legally punishable or not, is among the most unquestionable of its (the court's) powers and duties.'

"But, after the thorough investigation which has been given to this subject in previous cases, particularly those of *ex parte* Yerger, 8 Wall. 85, and *ex parte* Lange (supra), it is unnecessary to pursue the subject further at this time.

"The last mentioned case is confidently relied on as a precedent for allowing the writ in this case. But the two are totally unlike. In *ex parte* Lange we proceeded on the ground that, when the court rendered its second judgment, the case was entirely out of its hands. It was *functus officio* in regard to it. The judgment first rendered had been executed and satisfied. The subsequent proceedings were, therefore, according to our view, void."

The cases of *ex parte* Royall, 117 U. S. 241, do not differ in principle from the cases above cited. Royall presented his petition to the circuit court for a writ of error, alleging that the statutes under which he was held in custody were repugnant to the constitution of the United States, and void. The averments of the petition were necessarily presumed to be true upon this motion. The circuit court decided that it "was without jurisdiction to discharge the prisoner from prosecution."

This court was unwilling to affirm the judgment of the circuit court for the ground upon which the writ had been refused by that court.

This court said: "It is clear that, if the local statute under which Royall was indicted be repugnant to the constitution, the prosecution against him has nothing upon which to rest, and the entire proceeding against him is a nullity." Thus showing that the right to a discharge depended upon the statute being unconstitutional.

The court affirmed the judgment of the circuit court refusing the writ, upon the ground that the court was not bound to grant the writ at once, even where the statute is *repugnant to the constitution of the United States.*

The court, after discussing cases of urgency in which it would be necessary for the courts of the United States to act promptly, says: "The present cases involve no such considerations. Nor do their circumstances, as detailed in the petitions, suggest any reason why the State court of original jurisdiction may not, without interference upon the part of the courts of the United States, pass upon the question which is raised as to the constitutionality of the statutes under which the appellant is indicted. The circuit court was not at liberty, under the circumstances disclosed, to presume that the decision of the State court would be otherwise than is required by the fundamental law of the land, or that it would disregard the settled principles of constitutional law announced by this court, upon which is clearly conferred the power to decide ultimately and finally all cases arising under the constitution and laws of the United States. In Taylor vs. Carry, 20 How. 583, 595, it was said to be a recognized portion of the duty of this court—and, we will add, of all other courts, national and state—to give preference to such principles and methods of procedure as shall serve to conciliate the distinct and independent tribunals of the States and of the Union, so as they may co-operate as harmonious members of a judicial system co-extensive with the United States, and submitting to the paramount authority of the same constitution, laws, and federal obligations! And in Covell vs. Heyman, 111 U. S. 176, 182, it was declared "that the forbearance which courts of co-ordinate jurisdiction administered under a single system, exercise toward each other, whereby conflicts are avoided, by avoiding interference with the process of each other, is a principle of comity with perhaps no higher sanction than the utility which comes from concord; but between State courts and those of the United States it is something more—it is a principle of right and of law, and, therefore, of necessity."

The circuit judge, in his opinion filed upon the hearing of this case, said: "In *ex parte* Royall, 117 U. S. 251, the supreme court say, that while the circuit court has the power to do so, and may discharge the accused in advance of his trial, it is not bound to do so in every case; but in this case, if the party be not discharged immediately, the damage to him will be very great, if not irreparable. He will lose his whole year's business, and his rivals in trade will supplant him in the good will of his customers."

This is not a proper construction to be placed upon the decision, or the language used. Every opinion must be construed with reference to the questions decided. The court in that case passed upon a petition in which it was stated that the prisoner was held under a State law which was repugnant to the constitution of the United States, and void, and therefore properly decided that it was within the discretion of the court to discharge the prisoner before trial. But to discharge from what? From a prosecution under a void law; and not to try whether he was guilty or innocent under a valid indictment.

The defendant in error, however, in his petition sets forth in full the opinion of the supreme court of appeals of Virginia, recently delivered in the case of the Commonwealth vs. Jones, in which that court decided that the act under which he is held for trial, is not repugnant to the constitution of the United States, and is valid. He further states that the judge of the county court of Pulaski county, Virginia, in which he is being prosecuted, will be compelled to follow the decision of the supreme court of appeals in Jones' case, and thus he will be compelled to submit to a conviction, and to the expense and annoyance of an appeal to the supreme court of the United States to have vindicated his right to do an act which said supreme court has already decided he has a right to do; and he assigned that as a reason why the court should promptly act.

The assumption that the supreme court of appeals had been guilty of an absurdity in the decision of the case of the Commonwealth vs. Jones, is wholly unwarranted.

The claim that the decision is directly in the teeth of and refuses to recognize the authority of Royall vs. Virginia, 116 U. S. 572, is, likewise, unfounded.

The laws in force at the time, and under which Royall was prosecuted, differ radically from the laws in force at the time and under which Jones was prosecuted. The question presented for decision in the two cases differ equally as much.

The statutes which were pronounced unconstitutional in Royall's case absolutely forbid the receipt of coupons in any way for license taxes, and required such taxes to be paid in money, and nothing else.

The statutes under which Jones was prosecuted expressly directs the officer to receive the coupons, and forward them for identification and verification, under the act of January 14th, 1882, and when they have been verified under that act, the officer is required to issue the license. This does not require the pre-payment in money; the person tendering may wait until his coupons are verified, or he may pay his money, obtain his license, and then have the money refunded when the coupons are verified.

The main question presented for the consideration of the court in Royal vs. Virginia, was the claim of the State that the license was a privilege over which she had full control, which she could grant or refuse upon any terms she chose, and to obtain which the party must comply with the condition imposed—*i. e.*, to pay in money, and not in coupons.

The court decided this adversely to the claim of the State, holding that "the payment required as a preliminary to the license is in the nature and form of a tax, and is a due to the State which it may demand and exact from every one of its citizens who either will or must follow some business avocation within its limits, to the pursuit of which the assessment is made a condition precedent. It is an occupation tax, for which the license is merely a receipt and not an authority, except in that sense, because it is laid and collected as revenue, and merely as incident to the general police power of the State, which, under certain circumstances and conditions, regulates certain employments with a view to the public health, comfort and convenience."

The same conditions do not, therefore, exist now that existed when the case of Royall vs. Virginia was decided. The court did not consider fully the power of the State to require the person intending to pursue any business or calling for which a license was required to procure the license in the mode pointed out by the statute, because it held that the State, by commanding her officers to refuse all coupons tendered, had rendered it impossible for him to comply with the requirements.

Under the statutes in force now, he may comply with these requirements. He may tender the coupons and have them received without advancing the money, and may obtain his license when they have been verified.

The question squarely presented for the decision of the court under the present law is, whether the act directing the officer to receive the coupons and withhold the license until they are verified violates any right guaranteed to the defendant in error under the constitution of the United States. The opinion of the court in the case of Royall vs. Virginia does not deny the authority of the State to require the license, but holds that an applicant "who has done everything on his part required by the law cannot be regarded as violating the law, if, without the formality of a license wrongfully withheld from him, he pursues the business of his calling, which is not unlawful in itself, and which, under the circumstances, he has a constitutional right to prosecute."

The *circumstances* were that the State had absolutely refused to receive, in payment of license taxes, coupons, which the court held were so receivable. The General Assembly of Virginia, recognizing the principle thus decided, repealed the obnoxious statutes, and enacted others requiring the receipt of coupons for such taxes, pursuant to the act approved January 14th, 1882, which this court held valid in the case of Antoni vs. Greenhow, 107 U. S. 769.

The circumstances of this case are not, therefore, identical with or similar to those under which Royall vs. Virginia was decided.

This case comes within, and is governed by the principles announced in Antoni vs. Greenhow, supra. The court there held that the remedy was afforded the tax-payer under the act of January 14, 1882, and was substantially equivalent to the remedy by mandamus, which had been taken away.

In that case the court said:

"It cannot be denied that, as a general rule, laws applicable to the case which are in force at the time and place of making a contract enter into and form part of the contract itself, and 'that this embraces alike those laws which effect its validity, construction, discharge, and enforcement.' Walker v. Whitehead, 16 Wall. 314, 317. But it is equally well settled that changes in the form of action and modes of proceeding do not amount to an impairment of the obligations of a contract, if an adequate and efficacious remedy is left. This limitation upon the prohibitory clause of the constitution in respect to the legislative powers of the States over the obligation of contracts, was suggested by Chief Justice Marshall, in Sturges vs. Crowninshield, 4 Wheat. 122, and has been uniformly acted on since. Mason vs. Hale, 12 Wheat. 370; Bronson vs. Kinzie, 1 How. 311; Von Hoffman vs. City of Quincy, 4 Wall. 535; Drehman vs. Stifle, 8 Id. 595; Gunn vs. Barry, 15 Id. 611; Walker

vs. Whitehead, 16 Id. 314; Terry vs. Anderson, 95 U. S. 628; Tennessee vs. Sneed, 96 Id. 69; Louisiana vs. Pilsbury, 105 Id. 278. As was very properly said by Mr. Justice Swayne, in Von Hoffman vs. City of Quincy, *ubi supra*: 'It is competent for the States to change the form of the remedy, or to modify it otherwise, as they may see fit, provided no substantial right secured by the contract is thereby impaired. No attempt has been made to fix definitely the line between alterations of the remedy which are to be deemed legitimate and those which, under the form of modifying the remedy, impair substantial rights. Every case must be determined upon its own circumstances. Whenever the result last mentioned is produced, the act is within the prohibition of the constitution, and to that extent void. Page 553.' In all such cases the question becomes, therefore, one of reasonableness, and of that the Legislature is primarily the judge."

Admitting that the statutes of Virginia, as to the mode of applying for and obtaining a license to transact business, and forbidding the pursuit of the business or calling without the license, in their ordinary application, are constitutional and valid, such as the applicant must comply with, even if he tenders gold, is not the statute requiring the verification of the coupons before the license issues, constitutional, and within the power of the General Assembly?

But the idea that there are any other than genuine coupons is scoffed at and ridiculed. The supreme court of Virginia, in its recent decision in the case of the Commonwealth vs. Jones, very forcibly met this. The court said:

"The question of spurious bonds and coupons is one of too grave import to this commonwealth to be lightly brushed aside, and should not be treated with judicial incredulity."

"No fact, certainly none connected with the history of the Virginia State debt, is better established than that there are spurious bonds of the State out, some of which have been presented and claimed as valid, and their invalidity incontestibly established. It is idle to attempt to "whistle down the wind" the existence of such spurious bonds, and the absolute necessity of protection against them. Nor is it in keeping with the dignity of the judicial station, or with common fairness, to attribute to the State other and less honorable motives than those declared by her Legislature. In the preamble to the act of January 14, 1882, the fact of the existence of such spurious bonds is set forth, and also the fact of the passage of the act as a necessary means of protection to both the State and her creditors.

"Then, aside from all other evidences of the same facts, the Legislature of the State having thus found the facts, this court will hold the ascertainment one not to be questioned."

In Antoni vs. Greenhow, supra, this court, to the same effect, said:

"We ought never to overrule the decision of the legislative department of the government, unless a palpable error has been committed. If a state of facts could exist that would justify the change in a remedy which has been made, we must presume it did exist, and that the law was passed on that account. Munn vs. Illinois, 94 U. S. 113. We have nothing to do with the motives of the Legislature, if what they do is within the scope of their powers under the constitution."

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With great respect and deference I now make the point that the judgment of the circuit court should be reversed, because coupons cut from the bonds of the State of Virginia, issued under the acts of 1871 and 1879 are not a legal tender in the payment of taxes.

This controverts the principles decided by this court in the case of Poindexter vs. Greenhow, 114 U. S., 270, which the court is respectfully asked to review and overrule in so far as it decided that the coupons were a legal tender in payment of taxes.

It is not controverted that the State by virtue of the funding act contracted with her creditors to receive the coupons in payment of taxes and other debts. But it is earnestly contended that this contract ought not to be so construed as to give the coupons the quality of money when tendered for taxes.

Under laws in existence prior to and at the time of the passage of the funding bill in 1871, taxes, when duly assessed, in the hands of the collecting officer of the State had the force of an execution, and could be distrained for at any time after maturity.

The creditor then knew in advance that he was contracting with the State, and that she held an execution against the tax-payer, liable to be enforced at any time, and that if his coupons were not received he was remediless to enforce the agreement by suit against the State.

The decision in Poindexter vs. Greenhow does not deny that the State is exempt from suit, but proceeds upon the theory that the suit was not against the State, but against one of her officers who has violated the law, and thereby become a wrongdoer for which he was personally responsible in damages.

The position of the officer is described by Justice Matthews as follows:

The officer is proceeding to collect a valid tax by distress. Coupons are tendered in payment. The officer says I cannot receive them, for I am forbidden to do so by a law of the State. The taxpayer replies: "The State has passed no such law, for it cannot, and what it cannot do, it certainly, in contemplation of law, has not done." Here is the vital point in the decision; upon this principle the authority of the case must stand or fall.

Why is it not a law of Virginia? It is a law directly affecting her interest, and to any suit, to declare it unconstitutional, she is a necessary party. Then where is her judge? Who is to try whether it is a law? Why is she not supreme in this matter? Who can implead her? Confessedly she is deeply, directly, vitally interested. Her power to collect taxes and control her revenue is involved. She says this is a necessity. I must do it. I have the power to do it, and I will do it. Who can stop her? Where is the power vested to prevent her exercise of sovereign power over the holders of her obligations? This power existed when the contract was made, and extended into and pervaded every part of it.

Now comes the artificial reasoning, that, I respectfully submit, nullifies the eleventh amendment, and assumes a power unwarranted by the constitution of the United States.

Admitting that the State cannot be sued, it proposes to assert a jurisdiction over the government. The government in any of its parts can be sued when it exceeds the limits of its power, is the proposition maintained.

Under this doctrine, every officer of the State government is liable to be sued. And, as was well said in the dissenting opinion in the case under examination, "injunctions are sought, mandamuses are sought, damages are sought for the sole purpose of enforcing a specific performance of the engagements made by the State, by the act of 1871, to receive the coupons of the bonds issued under that act in payment of taxes and other dues to the State."

When the eleventh amendment used the language, "one of the United States," its full meaning was intended. The great body politic, speaking through its duly elected representatives and officers, administering the functions of government—not of an imaginary, intangible State, but of a living, physical State, teeming with inhabitants living within ascertained boundaries, who were to be protected in their lives, liberty, property, through the agency of the legislature, courts, and other executive and ministerial offices.

"A defendant sued as a wrongdoer, who seeks to substitute the State in his place, or to justify by the authority of the State, or to defend on the ground that the State has adopted his act and exonerated him, cannot rest on the bare assertion of his defence. He is bound to establish it. The State is a political corporate body, can act only through agents, and can command only by laws. It is necessary, therefore, for such a defendant in order to complete his defence, to produce a law of the State which constitutes his commission as its agent, and a warrant for his act. This the defendant in the present case undertook to do. He relied on the act of January 26th, 1882, requiring him to collect taxes in gold, silver, United States treasury notes, national bank currency, and nothing else, and thus forbidding his receipt of coupons in lieu of money. That, it is true, is a legislative act of the government of Virginia, but it is not a law of the State of Virginia. The State has passed no such law, for it cannot; and what it cannot do, it certainly, in contemplation of law, has not done. The constitution of the United States, and its own contract, both irrepealable by an act on its part, are the law of Virginia; and that law made it the duty of the defendant to receive the coupons tendered in payment of taxes, and declared every step to enforce the tax, thereafter taken, to be without warrant of law, and therefor a wrong. He stands then stripped of his official character, and confessing, a personal violation of the plaintiff's rights, for he must personally answer. He is without defence."

This is forcible language, and it seems at first blush as if its logic were unanswerable.

One of the first objections is that the court draws to itself the decision of the very question, which is reserved to the State to decide.

The 11th amendment is: "the judicial power of the United States shall not be construed to extend to any suit in law, or equity, commenced or prosecuted against one of the United States by citizens of another State, or by citizens or subjects of any foreign State."

Then the courts of the United States have not the power to declare the law governing a case in which the State is interested.

In all matters, therefore, concerning her pecuniary interests, her obligations and dealings with the class of people recited in the amendment, the State is supreme—supreme in the sense that there is no power which can call in question her acts in that behalf.

The court decides an issue without a necessary party, because to make the necessary party, there would be no issue to decide.

It is only by a chain of artificial reasoning that the jurisdiction can be established.

The framers of the amendment never contemplated that the courts of the United States would assert a control over the officers of the State which would nullify the amendment, and subject the State to the jurisdiction which its object was to defeat.

By this mode of reasoning, carried to its fullest extent, every officer in the commonwealth, from the governor down, may be imprisoned, and with the whole government gone, this *intangible being—the State*—would not be interfered with, but exist, with all its functions intact.

A bill is now pending in the circuit court for an injunction to restrain an important State board, composed of the first auditor, second auditor, treasurer, secretary of the commonwealth, and attorney-general, from performing its legitimate functions as a part of the government of the State. If the injunction is granted, and the officers refuse to obey it, five heads of departments will go to jail, and yet the State will not be affected, if the reasoning in this case is to prevail.

This principle, carried to its legitimate conclusion, would soon leave the State without a government. The governor is a member of several boards, which may offend, and the members be committed for refusing to recognize the jurisdiction of the court, and the State, with all her obligations to protect her 1,750,000 people in their lives, liberty and property, be left without an officer to exercise the functions of government.

The reasoning, in theory, gives us a perfect, ideal government, but, when applied to the practical working and stern realities of government, it won't do.

The framers of the constitution and amendments, dealt with principles, it is true, but principles of easy application to the practical workings of government as actually administered; they meant the body politic, the people of the State organized into government for safety and protection. When the amendment exempted a State from suit, it meant the organized government of that State. It meant the officers to whom had been delegated the power to rule over the people. It meant the people, acting through their vice-regents. Who shall say how far you may go? Who shall say when you may stop? When you have sued one of the officers of the State for refusing to comply with the contract of the State, you have sued the State, and there can be no other legitimate conclusion; and, using

the language of the dissenting opinion, "to say otherwise, is to talk only for effect, without regard to the truth of things."

In *ex parte* Virginia, 100 U. S. 339, which was an application for discharge from a prosecution under the act of Congress passed pursuant to the 14th amendment, it became necessary to support the reasoning of the court by impressing upon the act of the officer (which was illegal in the view maintained) the character of a representative of the State. Mr. Justice Strong, delivering the opinion of the court, said:

"A State acts by its legislative, its executive, or its judicial authorities. It can act in no other way. The constitutional provision therefore must mean that no agency of the State or of the officers or agents by whom its powers are asserted, shall deny to any person within its jurisdiction the equal protection of the laws. Whoever, by virtue of public position under a State government, deprives another of property, life, or liberty, without due process of law, or denies or takes away equal protection of the laws, violates the constitutional inhibition, and as he acts in the name and for the State, and is clothed with the State's powers, his act is that of the State. This must be so, or the constitutional prohibition has no meaning. Then the State has clothed one of its agents with power to annul or to evade it."

The reasoning of Judge Campbell in his admirable argument upon the hearing of the cases of New York and New Hampshire against Louisiana is very appropriate here. I quote from his brief:

"The United States have no judicial power which comprehends a State, nor the property of the State, nor the contracts of a State with any object of controlling her property, or enforcing performance of her contract. The fact that the United States may not do this, would seem to be an adequate answer. It is the State in the full exercise of sovereign power that has adopted the constitutional ordinance of 1879, and declared in what manner the public obligations of the State shall be performed. There is no authority in Louisiana that can overcome the force of this resolution except the power that so resolved. The power of the State to contract debts, and the power of the State to adjust their debts according to their own sense of obligation and duty, is not withdrawn from her by her own constitution nor the constitution of the United States. When the State made the debt, and made arrangements to pay the debt, she was independent of control, and was not constrained by any legal or political sanction that courts can employ. What Austin says on this subject is irrefragibly true. The laws which sovereigns

affect to impose on themselves, or laws which sovereigns affect to impose upon their successors, are merely principles or maxims which they adopt as guides, or which they commend to their successors. The sovereign for the time being, is not constrained to obedience. Austin on Jurist., p. 271.

My application of this citation to the States of the Union only embraces the power and authority of a sovereign character that are comprehended within the ninth, tenth, and eleventh amendments to the constitution, the keystones of the constitution of the United States.

It is not difficult to establish to the entire extent, the proposition that States in all ages and of every degree have employed this sovereign power over their receipts and expenditures, and have exercised over their contracts and debts, a control both identical and analogous to that which is embodied in the debt ordinance. We read that when Hannibal had failed in his attempt to conquer Rome, the Roman Senate debased her coin to one-sixth of its current value; and with that coin paid her debts to her legions, and that alteration of values took place in time of the republic, and under the empire repeatedly. We know that the English pound sterling now is not one-third of its original value; and that it was depreciated in order to diminish the debts of the crown. Burleigh, in the time of Elizabeth, applied a correction.

We know that the French livre was debased more than double as much as that of England. Three times during the eighteenth century did that kingdom declare her bankruptcy and adjust her debts by a law. In 1793, the republic called in the evidence of her entire debt, and the grand livre of the public debt from thence should be the only title of any creditor. In 1798, two-thirds of the inscriptions were reimbursed by certificates to be used only in purchase of the public domain, which in a little time were without value, leaving only one-third of debt remaining. A portion of the debt had been contracted A. D. 1375, and had undergone in the five centuries the abrasions of bankruptcy, but leaving a portion of the debt still unpaid. Great Britain in 1797, directed the suspension of specie payments and the forced circulation of the bills of the bank of England lasted for twenty-two years. We know that the debts and engagements of the confederation were assumed by the United States under the constitution, and that the domestic debt were settled by the reduction of a part of the principal; and continental money was redeemed with one for one hundred, other issues one for forty. That the payment of interest was deferred upon other portions of the debt till the year 1800, and generally reduced so that the treasury should not be overburdened, and that public credit might be restored. By every State of Europe, except Great Britain, under the pressure of war, internal commotion, public calamity and improvidence, within a century, similar expedients have been resorted to. Philip IV., of France, is described in history as covetous, unscrupulous, and cruel. He debased the coin and issued it

at the nominal value, and would redeem it or receive it in payment of taxes only at its intrinsic value. Dante describes him as a malignant plant, a modern pilate, and when the poet has in the paradise a vision of those books wherein the misdeeds of men are written down for the judgment, he is reminded of the evil the man on the Seine had done in falsifying the coin—*false giando la moneta.* A modern publicist, in recounting the changes in the standards of coinage in different countries, and the adulterate currency circulated from time to time, under stress of necessity, or more frequently because of profligate and unwarranted expenditure arising out of a vicious policy, and citing the debasement of the money in France, Great Britian, the United States, Russia, China, and the nations of Europe, leading to commercial embarrassments and individual ruin, says that these great empires and States had followed in the footsteps of that king whom Dante branded as a counterfeiter—*un faux monnayeur.*

"The cases before this court do not require nor allow explanation or apologies for Louisiana. The State has said to her assailants, whether States of the Union or citizens of the States of the Union: 'Who art thou that judgest another man's servant? To his own master he standeth or falleth.'

"The colonial history of this country is not wanting in instances of embarrassments, miscalculations, extravagance, and an undue appreciation of paper money, and an inadequate sense of the mischief of debt. Nor is the history of the United States during the century of their independence destitute of those instructive and costly lessons which our wise Franklin has told us that come from that stern master—experience. Their well being has compelled, or was supposed to compel, excessive issues of paper money, the suspension of cash payments by banks, the forced circulation of bills of credit, and the funding of debt upon terms of composition. The American creditor has complained out of court, and in court, that the obligation of his contract had been impaired and his vested rights had been infringed. The empire State, too, has extended forbearance and clemency to imperial institutions by suspending the effect of her laws. In these cases the policy was, perhaps, judicious, the mischiefs exaggerated, and a benefit attained—perhaps not. But the facts show that there has arisen, and will continue to arise, conditions where the law-making power must deal with such conditions upon principles that frequently inflict damage on individuals, and apparently violate sound principles of law and economy. The solution of such questions cannot be made in the decision of a case at law or equity. The laws are evoked because of the complication in public affairs. They are relative to government and the conduct of administration, and are needful to the attainment of ends by the employment of such means as the State has. In the guidance and administration of a State, there is nothing to be set down as immutable or irrevocable. The legislation, whatever it may be, ought not, except in few and unfrequent cases, to assume for any one the

definitive character of property. It is also in respect to a State of this Union. A State, like the United States, must retain powers adequate to the exigencies that may arise in its own condition. That condition is mutable, and the exigencies to arise are not manifest, sometimes not discoverable. It must therefore be always free to provide for permanent and steady security in the administration of the affairs of the State. It is not competent for her to disable herself by any alienation of her powers for this purpose, nor be controled in their exercise. Nor can any presumption be entertained that she has done so. In the case of Chisholm vs. Georgia, the court seemed to suppose that the most extensive interpretation was proper to subject the State to suits as corporations, and because the court was armed with supreme and unrestricted judiciary powers. Neither of the assumptions were justified. One of the amendments submitted by New York, avowedly as explanatory, was: "That the constitution under consideration is not to be construed to authorize any suit to be brought against any State in any manner whatsoever." This was submitted by Sam'l Jones, and sustained by Hamilton and Lansing. It corresponds with the Massachusetts resolves, and with Marshall's exposition to Virginia. Nor can there be on principle, to the recognition of this immunity, as one of those facilities the State had not delegated or ceded to the United States government, a rational exception.

"The States of the Union had maintained the war of the Revolution. The delegates to Philadelphia to amend and to reform the confederation were appointed by their legislature. Those legislatures now elected a branch of the congress of the United States and thus participate in the confirmation of federal officers and the formation of treaties. They command and train the militia of the Union, and have power to regulate the making of contracts, the law of succession, instruction, the transfer of property, and what relates to domestic and social order and tranquility. The States have a republican government, a magistracy, civil administration, and a body of people. They belong to a federal Union, and have interstate relation—as independent and equal States—enduring and indestructible. There is unity, force, duration, rights, faculties, which enable them to be separate, distinct, and constitutions and laws, of which their public powers is the minister and which develop consequences, for the amelioration of the condition of the State, as well as of the federal Union.

"With no particular admiration for the equivocal and undefined words, sovereign, national, federal, republican, or democratic, we can safely affirm that a State thus existing and thus connected ought not to be the subject of a judicial writ or warrant, unless her own consent has been plainly given, in any manner whatsoever.

"Had there been no eleventh amendment; had the constitution remained as it was when ratified by the States, this was the fair, appropriate and necessary construction of the constitution; and so far from their being any cause for the subjection of the States to

such a jurisdiction by anything that has arisen since, the experience of the past has multiplied reasons for maintaining the constitution inviolate."

It is claimed that such doctrine is monstrous, and, if sustained, will unsettle the basis of millions of debts, and be an act of gross injustice. But there never has been any just ground for asserting any such claim. There never was any such basis as is now claimed.

Doubtless, viewed from the standpoint of grasping capital, anything that forces it to unloose its devil-fish arms from its claim of a mortgage upon State sovereignty is disagreeable to contemplate. But, viewed from the standpoint of those who are anxious to see this government exist as a perpetual union of indestructible States, the preservation of the sovereign rights necessary to accomplish that result far exceed in importance all other interests involved.

A century's experience, during which this government has withstood all assaults from without and within, and grown and prospered beyond the wildest dreams of its founders, until it stands to-day the greatest nation on the globe, has demonstrated the wisdom of permitting the States to retain and exercise every sovereign right not incompatible with the discharge of the functions granted the general government.

The checks and balances which are interposed against dangerous tendencies under our dual system of government, the amount of freedom enjoyed by the citizen, and yet the vigor with which its powers are exercised when occasion requires, has challenged the admiration of statesmen from every land.

In the dissenting opinion in the case under examination, it is said: "This is the first time, we believe, since the eleventh amendment was adopted, in which a state has been coerced by judicial proceedings at the suit of individuals in the Federal courts. That this is such a case seems one of the plainest propositions that can be stated."

Through all the vicissitudes of nearly one hundred years, such a jurisdiction had never before been asserted.

It cannot be that it is necessary now to assert it when the general government is firmly established in the exercise of all its functions and loyally supported by sixty millions of freemen.

If it is necessary to establish such jurisdiction, now let it not be done by "technical devices" and unwarranted judicial construction.

The same power that declared the limitation, still exists, augmented by ~~thirteen~~ 25 additional States.

The same power that released the bonds and enfranchised the slaves, can subject the States to the unlimited jurisdiction of this court. If it is to come, let it come by an amendment to the organic law, as the other great social and political changes have been made. If Virginia is to be subjected to the jurisdiction of the federal courts, let it come by the judgment of her peers, whereby they will subject themselves to the same jurisdiction.

Far preferable would it be to see this court invested with plenary jurisdiction over the States in all cases, than to see it pronounce judgments from which every consequence flows that could flow from the exercise of such a jurisdiction.

If under the constitution this court had jurisdiction to pronounce judgment against Virginia upon her obligations, she would bow with becoming reverence to its decision, and the litigation which fills the federal courts would end.

But as it is, she declines to recognize the authority of a decision which assumed to adjudge her responsibility upon her contracts in a suit to which she was *held* not a party.

These views are submitted with the greatest respect, and with the earnest belief that they are right and should prevail.

R. A. AYERS,
Attorney-General of Virginia.

IN THE SUPREME COURT OF THE UNITED STATES.

WM. L. ROYALL
vs.
THE STATE OF VIRGINIA.

Brief of R. A Ayers, Attorney General of Virginia.

This case involves the same questions discussed in my brief filed in the case of H. A. Carper, jailor of Pulaski County, Va., against R. L. Fitzgerald, and I understand the two cases will be heard together.

The matter pertinent to this case will be found from the third paragraph on page 18 to the end of that brief, and will not be repeated here.

In the case of *Royall* vs. *Virginia*, 116 U. S., 572, which was similar to this, the mode of prosecution being exactly the same, it was held that "as the sum demanded for the license is a tax, the provision for the punishment of one who pursues his profession without a license, is a part of the revenue system of the State, and is a means merely of enforcing payment of the tax itself, or of a penalty for not paying it."

It is legally equivalent to a civil action of debt, upon the statute, and its substantial character is not changed by calling the default a misdemeanor, and providing for its prosecution by information.

The present case, therefore stands precisely, so far as the constitutional questions arising in it are af-

fected, as if it were a civil action in which the Commonwealth of Virginia was plaintiff, seeking to recover the amount due on account of the tax and penalty.

In that aspect, no one would doubt that it would be a perfect defense that the defendant had previously paid the demand, or, what we have held to be legally equivalent, had tendered the amount in the coupons of the State, receivable in payment by an irrepealable contract, but which the appointed authorities of the State had wrongfully refused to receive. Such, as we conceive it, is the present case.

The State of Virginia has sued the defendant for the recovery of a tax which he offered to pay when it became due in its own coupons, which, by the law of its contract were receivable in satisfaction of the demand. Certainly the State cannot be permitted to recover against its own contract from the other contracting party, as to whom the only default alleged is that he has performed the contract on his part.

Treating the prosecution as above interpreted, I have discussed the question, the same principle being involved in both cases, from the standpoint of the State, that coupons are set-offs or counter demands, and the real and substantial effect of sustaining the defense, is to pronounce judgment against her for the amount of the coupons tendered.

R. A. AYERS,
Att'y Gen. of Va.

SUPREME COURT OF THE UNITED STATES.

[redacted]

[redacted]

[redacted]

APPELLANT'S BRIEF.

[redacted]

SUPREME COURT OF UNITED STATES.

OCTOBER TERM, 1886.

No. 1341.

H. A. CARPER, Jailor of Pulaski Co., Va.,

AGAINST

RICHARD L. FITZGERALD.

APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE EASTERN DISTRICT OF VIRGINIA.

Statement.

The record in this case shows that the appellant, Fitzgerald, is a duly authorized traveling salesman for the mercantile house of Austin, Fields & Co., of Philadelphia; that December 16, 1886, he tendered to Greenhow, Treasurer of the City of Richmond, coupons for the sum of $99 and $1.75 in lawful money of the United States, said coupons having been cut from bonds of the State of Virginia, issued under the Act of March 30, 1871, and being overdue and past maturity; that said tender was made for the purpose of procuring a license from December 16, 1886, to December 16, 1887,

for said Austin, Fields & Co., as sample merchants in the State of Virginia; that at the time of said tender, demand was made of Greenhow for a certificate in writing stating the deposit of said coupons and money for said purpose, but that said Greenhow refused to give said certificate or any other certificate; that Fitzgerald thereupon, on the 25th day of January, 1887, in pursuit of his business, sold, and offered for sale, by sample, goods, wares, &c., of Austin, Fields & Co., and was thereupon arrested, under authority of the State of Virginia, upon the charge of violating the law of the State by selling and offering goods without license; and that being held in custody on said charge by the appellee, Carper, as jailor, he presented his petition in *habeas corpus* to the Judge of the Fourth Circuit, Hon. Hugh L. Bond, praying his release from said custody, upon the ground that he was held unlawfully, and in violation of the Constitution of the United States.

Upon the petition setting forth the foregoing facts, the Circuit Judge issued the writ, returnable at the United States Court House in Baltimore, February 2, 1887. Upon the return to the writ, setting forth the arrest and commitment of the appellant, the appellant demurred to the return as insufficient in law to justify his detention. Upon the hearing upon the return and demurrer, the Circuit Judge, February 2, 1887, ordered the discharge of the appellant by the following order:

"H. A. Carper, Jailor of Pulaski County, Virginia, in "obedience to the writ of *habeas corpus* awarded on the "29th day of January, 1887, and to him directed, this "day brought before me the body of the petitioner R. "L. Fitzgerald, in said writ named, and certified that "the cause of detention of said Fitzgerald would ap"pear by the return to said writ, to which the petitioner "demurred, and having heard and considered the argu"ment of counsel, as well on behalf of said Fitzgerald "as of the Attorney-General of Virginia in opposition "thereto, I am of opinion, for reasons filed in writing, "that the said Fitzgerald is detained in custody of the

" said Carper, Jailor, in violation of the Constitution of " the United States, and I do order that he be dis- " charged from the custody aforesaid.

" And it is ordered, that the papers in this case be " filed in the Circuit Court of the United States for " Richmond, Virginia, and that this order be recorded " in said Court."

Thereupon on the same day an order was made by the Circuit Court allowing an appeal from the foregoing order to the Supreme Court of the United States.

The opinion of the Circuit Judge is brief and is as follows:

" We are of opinion that the revenue laws under " which this party is held, which provide for the rais- " ing of revenue in Virginia, constitute one law, al- " though they have been enacted in separate chapters " and at different times, and we are of the opinion that " the act of the Legislature of Virginia, passed 1885 to " '86, Chap. 415, which requires parties who desire to " sell by sample in that State, and who tender coupons " of the bonds of the State in payment of licenses so to " sell to deliver such coupons to the State officers for " verification, and forbids them to exercise that busi- " ness till the same are verified, while parties who pay " their license fees in money are allowed to proceed at " once in their conduct of their business is an uncon- " stitutional act, because it impairs the obligation of " the contract made by Virginia with the coupon " holder, which was that the coupons would be received " in payment of all public dues and taxes. This statute " in effect adds to the contract the words 'after they are " verified,' which is a new condition altogether that " greatly impairs the value of the coupon. Virginia " has by law made the coupon as much a legal tender " for public dues and taxes as is a greenback, and " it is not necessary to show what an impairment it " would be to the value of the latter did its genuine " character have to be proved every time it is offered in " payment for a debt.

" The petition in this case sets forth in detail the " laws under which the petitioner is detained, and the " facts which caused his arrest and imprisonment.

"These allegations of the petition are not traversed "or denied, and must be taken as true. Taking them "to be true, it fully appears, as we think, that the pe- "titioner is held in violation of the Constitution of the "United States. The case must be considered, the "respondent not denying the allegations of the pe- "tition, as if those alleged facts were in the return, and "that the return did state that the party was held for "the reasons and under the circumstances alleged, as "well in the petition as in the return proper.

"We have concluded to determine this case imme- "diately, without further consideration, that it may go, "if the Virginia authorities so determine, to the Su- "preme Court at once, that an early decision of that "tribunal may prevent further illegal arrests of a like "character, if this case should be decided so to be.

"*In Ex Parte* Royall, 107 U. S., 251, the Supreme "Court say that while the Circuit Court has the power "to do so, and may discharge the accused in advance "of his trial, it is not bound to do so in every case; "but, in this case, if the party be not discharged im- "mediately, the damage to him will be very great, if "not irreparable. He will lose his whole year's busi- "ness, and his rivals in trade will supplant him in the "good will of his customers.

"We think the party should be discharged, and an "order will be made accordingly."

ARGUMENT.

The single question to be considered here is, Whether the Circuit Judge erred in discharging the prisoner under the circumstances of this case.

I.

It is said that one ground of error of the Circuit Judge is in assuming jurisdiction to act in this case outside the State of Virginia.

It is difficult to understand how such a position can be seriously considered or thought of. In *Ex parte* Clark, 100 U. S., 399—a case which arose on the return to a writ of *habeas corpus*, issued by one of the Justices of this Court—it appeared that the petition was presented to Mr. Justice STRONG July 31, 1879, who allowed a writ of *habeas corpus*, returnable forthwith before himself, at the Catskill Mountain House, in the State of New York; that on the 11th August, 1879, return being made of the body of the petitioner according to the command of the writ, with a copy of the judgment of the Court below and the return of commitment issued thereon, Justice STRONG made an order postponing the hearing of the cause into this Court, to be heard upon the 2d day of October, 1879 (being the first day of the Term), and admitted the petitioner to bail in the sum of $5,000, to abide the rule of the Supreme Court in the premises.

And in *Ex parte* Siebold, 100 U. S., 371, it also appeared that the petitioner, in September, 1879, presented a separate petition to the Chief-Justice of this Court, at Lyme, in the State of Connecticut, where he then was, praying for a like *habeas corpus*, to be relieved from the same imprisonment. The Chief-Justice thereupon made an order that the said Marshal and Warden should show cause before him, on the 2d day of October, in the City of Washington, why such writ should not issue; and thereupon, on the first day of the Term of this Court, at the instance of the Chief-Justice, the application was made to the Court by a new petition, and the petition and papers presented to the Chief-Justice were, by consent, made a part of the case.

In these, and in many other cases which might be cited, no suggestion of a want of power on the part of the Justices of this Court to issue writs and hear causes in *habeas corpus* without regard to State lines, has been made. In each of the cases above cited, the Justices of this Court were not, at the time of taking jurisdiction

of the cause, within their own circuits; and in *Ex parte* Clark this Court says: "The Justice who issued the "writ could undoubtedly have disposed of the case "himself, though not at that time within his own Cir- "cuit. A Justice of this Court can exercise the power "of issuing the writ of *habeas corpus* in any part of the "United States where he happens to be" (page 403).

§ 607 of the United States Revised Statutes is as follows: "For each Circuit there shall be appointed a Cir- "cuit Judge, who shall have the same power and juris- "diction therein as the Justice of the Supreme Court "allotted to the Circuit," &c.

If the above objection is made, and seriously made, in this case, it must be upon grounds which cannot be apprehended beforehand, and which certainly do not appear in any of the numerous cases which have arisen in *habeas corpus* in the United States Court within our knowledge.

II.

As matter of law, was the Circuit Court justified in discharging the prisoner?

The case of *Ex parte* Royall, 117 U. S., 241, conains a very careful and explicit decision upon the powers as well as the duties of Circuit Courts in cases of *habeas corpus* such as the present. In that case the petitioner, having been indicted by a grand jury of Virginia, was in custody under process from that Court for an alleged defense against the laws of that State, and he claimed that he was restrained of his liberty in violation of the Constitution of the United States, and applied to the Circuit Court for his discharge on *habeas corpus*. The writ being refused by the Circuit Judge, the case was

brought to this court, where it was decided, with unusual solemnity and precision, that in such a case "the "Circuit Court of the United States has a discretion "whether it will discharge the prisoner upon *habeas* "*corpus*, in advance of his trial in the Court in which "he is indicted; that discretion, however, to be sub-"ordinated to any special circumstances requiring im-"mediate action." And, referring to the right of the petitioner to his appeal from the final action of the State Court, this Court says: "When the State Court "shall have finally acted upon the case, the Circuit "Court still has a discretion whether, under all the cir-"cumstances then existing, the accused, if convicted, "shall be put to his writ of error from the highest "Court of the State, or whether it will proceed by "writ of *habeas corpus* summarily to determine whether "the prisoner is restrained of his liberty in violation of "the Constitution of the United States."

The doctrine of this Court, therefore, upon such a case as the present, is, that before trial in a State Court, the United States Circuit Court, upon a writ of *habeas corpus* alleging that the imprisonment is in violation of the Constitution of the United States, has a discretion to discharge the prisoner from custody; and, second, that even after his conviction in the State Court, this Court has a similar discretion.

In that case the Court further observes: "What law "and justice may require in a particular case is often "an embarrassing question to the Court, or to the "judicial officer, before whom the petitioner is brought. "It is alleged in the petitions, neither one of which, "however, is accompanied by a copy of the indictment "in the State Court, nor by any statement giving a "reason why such a copy was not obtained, that the "appellant is held in custody under process of a State "Court, in which he stands indicted for an alleged of-"fense against the laws of Virginia. It is stated in "one case that he gave bail, but was subsequently sur-

" rendered by his sureties. * * * The question as " to the constitutionality of the law under which he " is indicted must necessarily arise by his trial " under the indictment, and it is one upon " which, as we have seen, it is competent for " the State Court to pass. Under such circumstances, " does the statute imperatively require the Circuit " Court, by a writ of *habeas corpus*, to wrest the " petitioner from the custody of the State officers, in ad- " vance of his trial in the State Court? We are of " opinion that while the Circuit Court has the power to " to do so, and may discharge the accused in advance " of his trial, if he is restrained of his liberty in viola- " tion of the National Constitution, it is not bound in " every case to exercise such a power immediately " upon application being made for the writ."

III.

It is only necessary, therefore, to further consider whether the appellant was held in violation of the Constitution of the United States.

The law imposing the tax or license on sample merchants is part of an act approved March 6, 1886 (Acts '85-6; Chap. 448, Sec. 31, p. 508), and is as follows:

" ACTS 1885-6, CHAPTER 448, SECTION 31, PAGE 508,
" APPROVED MARCH 6, 1886.

" *Sample Merchants' Licenses.*

" *31. For the privilege of selling by sample, card, de-* " *scription, or other representation, any person, firm, or* " *corporation, in order to obtain the right to exercise the* " *same, shall pay one hundred dollars; and any sample*

merchant who shall permit any person except a duly authorized agent or salesman to sell under his license, otherwise than for his exclusive use and benefit, shall pay a fine of five hundred dollars for each offense. No agent or salesman shall be permitted to sell or offer to sell as aforesaid, except he have with him at the time the license granted to the person for whom he acts, and a duly executed power of attorney from said person constituting him his agent or salesman. For every agent or salesman employed to sell as aforesaid, by any person, firm or corporation, there shall be paid one hundred dollars, in order to obtain the privilege aforesaid; and no agent or salesman shall be permitted to sell or offer to sell as aforesaid, except he have with him at the time a certificate from the auditor of public accounts, or the commissioner of the revenue issuing the license, that the license to the person for whom he acts has been granted, which certificate shall also state the name of the person or firm to whom the license was granted, and the name of the agent or salesman using the same; and such certificate and power of attorney shall be exhibited whenever required by any officer of the law or private citizen. Sales of wine, ardent spirits, malt liquors, cider, or any mixture of any of them, by sample, shall be limited to sales by wholesale, and any person who desires to sell wine, ardent spirits, malt liquors, cider, or any mixture of them, by sample, may do so upon paying the same amount that is required to be paid by the wholesale liquor merchant. This section shall not be so construed as to prevent any planter from selling all tobacco raised by himself, by sample or otherwise. Nothing in this or the preceding section shall be construed to require any licensed merchant who has paid for his merchants' license an amount of not less than one hundred dollars, to pay an additional amount for selling or offering to sell by sample, either by himself or agents; but before any merchant shall be author-

"ized to sell either by himself or his agents, he shall "obtain a certificate from the commissioner of the "revenue of the county or corporation in which he is "licensed, showing that he is conducting a *bona fide* "mercantile business in such county or corporation, "and has not taken out a merchants' license to avoid "the payment of the assessment on sample merchants; "and no county, city, or town other than that in which "such merchant has his place of business, shall impose "any license tax upon such merchant for selling by "sample; and any sample merchant who shall hire his "license to another, or allow the use of the same to any "other person, firm, or corporation shall forfeit such "license; and the person, firm, or corporation using "such license shall pay a fine of two hundred and fifty "dollars for each offense; and any person, firm, or cor- "poration who may be found using a license not granted "by the officers authorized by chapter one of this act "to issue such license; and any person, firm, or corpo- "ration using any such license in this State, and which "is ascertained to be fraudulent, such person, firm, or "corporation shall be deemed guilty of a misdemeanor, "and on conviction, shall be fined two hundred and "fifty dollars and imprisoned for one year; and pro- "vided further, that this section shall apply alike to "resident and non-resident sample merchants; pro- "vided, however, that any manufacturer who shall have "been assessed, and paid on the capital employed in "his business, as provided in Schedule C of this act, "shall not be required to pay an additional sum for "sale by sample."

Another Act, approved March 4, 1886 (Acts '85 '6, p. 467), provides as follows:

"CHAP. 415.—AN ACT to prevent frauds upon the "commonwealth and the holders of her securities "in the collection and disbursement of revenues, "and to repeal section 112 of an Act approved

"March 15, 1884, entitled an Act to provide for "the assessment of taxes, &c., and to repeal an "Act approved February 7, 1884, entitled an Act "to regulate the granting of licenses; and to re- "peal an Act approved February 25, 1884, en- "titled an Act to regulate granting of licenses, &c.

Approved March 4, 1886.

"§ 1. Be it enacted by the General Assembly of Vir- "ginia, that every person or firm, partnership or asso- "ciation, express, telegraph, telephone and every incor- "porated company which now is or may be required to "obtain a license in order to do business in this State, "desiring to obtain such license, shall make application "therefor in writing to the commissioner of the rev- "enue of the county or corporation wherein such busi- "ness is proposed to be conducted, or to the Auditor "of Public Accounts in such cases as he is authorized "by law to issue a license, in which application it shall "be stated the nature of the business, the residence of "the applicant, the place where it is proposed to con- "duct such business, the amount of the assessment "prescribed by law as a condition precedent to "the issuing such license, accompanied by the certificate "in writing by the treasurer of the county or corporation "wherein such business is proposed to be conducted, "stating what amount in coin, legal tender notes, or "national bank bills has been deposited with him by "said applicant; provided, however, in such cases as "the Auditor of Public Accounts is authorized by law "to issue license, such deposit as herein provided for, "shall be made with him at the time such application "is presented, instead of with the Treasurer: provided, "that if such applicant shall make tender of any papers "or instruments in print, writing, or engraving, pur- "porting to be coupons detached from bonds of the "commonwealth issued under the act approved thirtieth

"day of March, eighteen hundred and seventy-one,
"entitled, An Act to fund the public debt, or under the
"act approved March twenty-eighth, eighteen hundred
"and seventy-nine, entitled, An Act to provide a plan of
"settlement of the public debt, in payment of any such
"assessment prescribed by law, the Treasurer or Audi-
"tor, as the case may be, to whom such tender is made,
"shall receive such coupons for identification and veri-
"fication in accordance with the provisions of Act of
"Assembly, approved January fourteenth, eighteen
"hundred and eighty-two, entitled, An Act to prevent
"frauds upon the commonwealth and the holders of
"the securities in the collection and disbursement of
"the revenues. But no license shall issue, nor shall
"the applicant therefor have the right to conduct any
"business or pursue any profession, trade or calling
"for which such license is required by law, unless and
"until the said coupons shall have been verified in the
"manner prescribed by said act of fourteenth January,
"eighteen hundred and eighty-two.

"§ 2. Upon the receipt by the Commissioner of the
"Revenue or Auditor, as the case may be, of an appli-
"cation of a person or firm, partnership or company,
"who has complied with the foregoing section, he shall
"endorse said application as follows: 'I find the with-
"'in application correct, and in due form, and accom-
"'panied with the certificate in writing of the Treasurer
"'of the county or corporation, that the sum of ——
"'dollars in gold or silver coin, or United States
"'treasury or national bank notes, has been deposited
"'with the said Treasurer, or that coupons have been
"'tendered by the applicant and verified as required
"'by the first section of this act, or that the same
"'accompanied the application, and was deposited
"'with the Auditor' (*as the case may be*), to which
"endorsement he shall sign his name and file said
"application in his office, furnishing the applicant with
"a duplicate copy of the same. If it shall appear that

" all the provisions of this act have been complied with
" then the Court or person having authority to grant
" or issue such license may hear the application, and
" if in due form, may grant such license, provided that
" in case such license shall be refused such refusal shall
" be entered upon such application, and the same re-
" turned to the applicants, who, upon presenting such
" application, endorsed with such refusal, to the officer
" with whom the deposit was made, shall have the same
" returned to him by the said officer.

" § 4. No application for a license to do business, or
" to follow any profession, trade or calling in the State
" shall be made, and if made, shall nor be considered,
" except in pursuance of this act; and no such license
" shall be granted unless all the requirements of this act
" shall have been first complied with; and any license
" granted or obtained in violation of the provisions of
" this act shall be null and void, and the person or
" persons, firm or association, joint stock or incorporated
" company, which may obtain such license, and attempt
" to do business thereunder, shall be deemed to violate
" the law, and shall be liable to all the forfeitures, pains
" and penalties for such violation in the same manner
" as if no such license had been obtained, and in addi-
" tion thereto fined not less than fifty dollars nor more
" than five hundred dollars.

" 2. Any Assessor, Treasurer or other officer charged
" with any duty pertaining to the granting of licenses,
" who shall violate this act shall be guilty of a misde-
" meanor, and upon conviction thereof shall be fined
" not less than fifty nor more than five hundred dol-
" lars.

" 3. The Auditor of Public Accounts shall forthwith
" have prepared and furnished to commissioners of the
" revenue of this State blank forms of applications for
" licenses required to be made in writing by this act.

" 4. Section one hundred and twelve of an act ap-
" proved March fifteenth, eighteen hundred and eighty-

" four, entitled, An Act to provide for the assessment
" of taxes on persons, property, and income, and im-
" posing taxes thereon for the support of the govern-
" ment and public free schools, and to pay the interest
" on the public debt, and to provide for the mode of
" applying for license to transact any business in this
" State, and prescribing the amount to be paid as a
" condition precedent to the right to transact such
" business; and an act entitled An Act to regulate the
" granting of licenses for the exercise of any privilege,
" approved February seventh, eighteen hundred and
" eighty-four; and an act entitled An Act to amend
" and re-enact sections one and two of an act entitled
" An Act to regulate the granting of license for the ex-
" ercise of any privilege, approved twenty-fifth Febru-
" ary, eighteen hundred and eighty-four, are hereby re-
" pealed.

" 5. This act shall be in force from its passage."

Another act, approved March 15, 1884 (Acts 1883 84, p. 578), provides as follows:

" ACTS 1883 4, SECTION 30, CHAPTER 450, PAGE 578,
" APPROVED MARCH 15, 1884.

" *Sample Merchants.*

" *30. Any person who shall sell or offer to sell any*
" *description of goods, wares or merchandise by sample,*
" *card, description, or other representation, verbal or*
" *otherwise, or any agent for the sale or collection of or-*
" *ders by sample or description list, such as is furnished*
" *by the C. O. D. Supply Company of America, or any*
" *similar company of America, or any similar company,*
" *shall be deemed to be a sample merchant. It shall not*
" *be lawful for any person or persons to sell or to offer to*
" *sell, any description of goods, wares, or merchandise,*
" *without first having obtained a license therefor from*

"*the auditor of public accounts, or from a commis-*
"*sioner of the revenue of some county or corporation,*
"which license shall grant the privilege to sell any-
"where in the State, and shall be valid one year from
"the date of its issue; but if used out of the county
"or corporation where granted, the clerk of the court
"of such county or corporation shall certify thereon,
"with the seal of the court affixed, that the officer sign-
"ing the said license is really the commissioner of the
"revenue for the district wherein the license issued,
"and that his signature is believed to be genuine: pro-
"vided that it shall not be lawful for the clerk of any
"county or corporation to furnish any certificate relat-
"ing to the grant of a license other than in the manner
"authorized and directed by this section. Such
"license, thus obtained, shall be a personal privilege,
"and shall not be transferable, nor any abatement of
"the sum required to be paid therefor be allowed. No
"county, city, or town shall have the right to require a
"license of sample merchants. ANY PERSON OR PERSONS
"WHO SHALL SELL OR OFFER TO SELL IN VIOLATION OF
"CHAPTER ONE OF THIS ACT, SHALL PAY A FINE OF FIVE
"HUNDRED DOLLARS FOR THE FIRST OFFENSE, AND SIX
"HUNDRED DOLLARS FOR EACH SUCCEEDING OFFENSE, THE
"INFORMER TO RECEIVE ONE-HALF OF THE FINE SO COL-
"LECTED. Nothing in this section shall be construed
"to allow sample merchants to sell to any person
"other than a manufacturer or licensed merchant, or
"keeper of an ordinary eating house, without taking
"out the additional license required of merchants; nor
"shall anything in this section be construed to allow
"any manufacturer to sell by sample any goods, wares,
"or merchandise unless he shall have been assessed
"and taxed on the capital invested as provided in
"fourth classification, Schedule C, of chapter one of
"this act, or shall take out the license required of sam-
"ple merchants, as provided in section thirty-one of
"chapter one of this act."

It is to be observed here that the record shows no allegation on the part of the State, at any stage of the proceedings, that the coupons tendered by the appellant were not genuine, valid coupons of the State of Virginia, the position of the State being that by virtue simply of the provisions of the Act of January 14, 1882, referred to in the Act of March 4, 1886, a tender of coupons is not sufficient unless that tender is followed by verification in the manner prescribed by the Act of January 14, 1882.

Now, this Court has certainly held in the most unmistakable terms that "the taxpayer has a contract "right to pay his taxes in coupons; that a tender of "them for that purpose, as to subsequent steps to collect the tax as delinquent, was equivalent to payment; and that a seizure of property under a levy "thereafter for non-payment is a trespass, notwithstanding any Act of the General Assembly to the "contrary; for such an act being in breach of the obligation of the contract of the State is unconstitutional, "and, therefore, null and void."

Chaffin vs. Taylor, 116 U. S., 571, 572.

And this Court further held, in *Royall vs. Virginia*, 116 U. S., 572, that licences are taxes; and that "the "plaintiff in error in that case had been prevented "from obtaining a license to practice his profession, in "violation of his rights under the Constitution of the "United States;" and that "to punish him for practicing it without a license thus withheld, is equally a "denial of his rights under the Constitution of the "United States, and the law under the authority of "which this is attempted must, on that account, and "in his case, be regarded as null and void."

Whether, if there were an allegation by way of defense on the part of the State, that the coupons in question were spurious or counterfeit, and that for that reason the license was withheld, the defense would be

good, need not here be considered; for the only question is, has the State of Virginia a right to attach the condition that the coupons shall be verified before their tender shall have the effect of payment?

This is a question which is not open to discussion, in our judgment, after the decisions which this Court has already rendered. For this Court, in *Poindexter vs. Greenhow*, 114 U. S., 270, held that "the coupon holder who tenders coupons in payment of taxes which are refused stands upon the same footing in this respect as though he had tendered gold coin in similar circumstances and with like result."

Unless, therefore, the State of Virginia could lawfully imprison one of her citizens who had tendered gold in payment of a license tax, she cannot lawfully imprison this appellant, who has tendered coupons.

To show that the act which is here brought in question is not an effort in good faith on the part of the State to protect her treasury from spurious coupons, but that it is rather a direct and studied effort to defeat the tender of genuine coupons, would be, at this stage of the history of this litigation, a work of pure supererogation, on which we decline to enter.

It does not seem really needful to notice the case of Commonwealth vs. Jones, which is set out at length in the petition in this case. So palpable and abortive an attempt under the guise of a judicial decision to avoid and circumvent the effect of a decision of this Court is as unprecedented as it is ineffective.

In that case Jones was indicted for unlawfully selling goods &c., without a license. He pleaded a tender in tax-receivable coupons, and demanded a certificate to that effect from the treasurer. The treasurer refused to receive the coupons, or to give the certificate demanded. And thereupon Jones made affidavit to that effect, and presented it to the Commissioner of Revenue of the city, and demanded of him the license, which was refused. To this plea the State filed a replication,

setting up the provisions of the act of March 4, 1886, and the offer of the treasurer to receive the coupons for identification and verification, and to give the certificate upon payment of the license tax in money, or, if the defendant did not desire to pay the license tax in money, to receive the coupons for verification and identification, and thereupon, and not until then, to issue to said defendant the proper certificate. The defendant demurring to this replication, the Court sustained the demurrer, and ordered the discharge of the defendant; and the State thereupon took a writ of error to the Court of Appeals of Virginia. This Court, in Royal vs. Virginia, 116 U. S., 572, having held that the acts of February 7, 1884, and March 15, 1884, were unconstitutional and void, said: "If a State officer, acting in "obedience to a statute of the State which is in conflict "with the Constitution of the United States, refuses to "issue a license to a person who has duly tendered the "amount, the person tendering need not take legal "steps to compel the issuance of the license before "doing business."

The Court of Appeals of Virginia thereupon proceeds to inquire what is meant by the language "if a "State officer refuses to issue a license to a person "who has tendered the amount required by law," and proceeds to say that this means necessarily that the amount was tendered in money, or in genuine tax-receivable coupons.

Why does the Court here apply the word "genuine" to tax-receivable coupons and not to money? Of course it is implied that the money is genuine as well as the tax-receivable coupons. But this Court did not say, "a person who has tendered the amount in genuine "money or in genuine coupons," but simply "the amount." The Virginia Court proceeds to say that "if the amount be not tendered in money or in genuine "tax-receivable coupons, but only in paper purporting "to be such coupons as to the genuineness of which the

"officer entertains reasonable doubts, impressed upon "him by the plain terms employed by the Legislature "in the preamble and in the body of the acts referred "to, and the officer makes such refusal in obedience to "a Constitutional Statute of the State, then in "such cases the Supreme Court of the United States "did not say, or intend to say, in Royal's case that "the person tendering need not take legal steps to "compel the issuance of license before doing busi-"ness."

Is not the above almost beneath or beyond argument? Change the words a little and read: "If the amount be "not tendered in genuine money, but only in paper "purporting to be such money, as to the genuineness "of which the officer entertains reasonable doubts, "impressed upon him by the plain terms employed by "the Legislature," &c., "then in such case the Supreme "Court of the United States did not intend to say that "the person tendering need not take legal steps," &c. All money is capable of being counterfeited as much so as coupons are.

But the all-sufficing answer to these quibbles is, that no officer of Virginia undertakes to allege that the coupons in any of these cases are spurious or counterfeit. The provision of the statute is that all coupons, without reference to their character, are to be rejected as a tender in payment of licenses. The acts which are considered in Royal vs. Virginia simply provided that coupons should not be received at all in payment of licenses; and the present acts require that they shall not be received in payment of licenses until they have been verified, and that, too, be it always remembered, without any allegation or any pretense of evidence, or even opinion, that such coupons were spurious or counterfeit.

We say deliberately that Virginia might as well undertake to pass an act declaring that her treasurers should receive no money in payment of licenses until

the money was verified, in the absence of any allegation, or alleged suspicion, that the money was spurious or counterfeit, as to say, as she does in these statutes, that the coupons shall not be received, in the absence of any allegation, or alleged suspicion, that such coupons are counterfeit or spurious, in payment of licenses.

It is, therefore, strictly proper to say of such a decision rendered by a Court however high, that it is absurd to hold that this Court did not intend to decide, and did not decide, that coupons were a legal tender in payment of licenses in the State of Virginia, and that the person so tendering was entitled to the same rights as if he had tendered money.

The learned Attorney-General undertakes, as did the Court in Commonwealth vs. Jones, to draw a distinction between refusing coupons altogether, and refusing them until they shall be verified. No such distinction can for a moment avail.

It is true that under the statutes now in force, by paying in money, the citizen may obtain a license at once, or, by waiting until after a trial in which his coupons shall be verified, he may obtain his license. But the former case is not a more distinct departure from the contract embodied in these coupons than is the latter.

The learned Attorney-General proceeds to claim that the present case falls within the principles announced in Antoni vs. Greenhow, 107 U. S., 769. It has been pointed out in every argument upon the coupons before this Court, and has been pointed out by the Court in its numerous decisions, that the entire scope of the decision in Antoni vs. Greenhow was simply that, as a mode of compelling the State to accept coupons in payment of taxes, the suit provided for in the act then under consideration was a fair substitute for the former process by mandamus, which was in force when the act of 1871 was enacted. And there are no principles laid

down or suggested in that opinion which go beyond this point.

But we are not surprised that the learned Attorney-General does not rely upon the reasoning of the case of Commonwealth vs. Jones—if, indeed, we ought to dignify that opinion by such a name—but proceeds to attempt to "controvert the principles decided by this "Court in the case of Poindexter vs. Greenhow, 114 U. "S., 270," and to ask this Court to review and overrule that case, in so far as it decided that the coupons were a legal tender in payment of taxes.

The decision of this Court in Poindexter vs. Greenhow is certainly at the present time the settled law of this Court; and until we are advised that this Court desires argument to show that that case was wrongly decided, we shall refrain from following the learned Attorney-General.

It is, however, claimed that the Court below erred in holding that the petition or the facts stated in the petition were to be considered in passing judgment in this case; that as the return to the writ was demurred to, the only issue presented, or on which judgment could be passed, was the sufficiency of the return.

It is true that at common law, the return was conclusive of all the facts therein stated.

2 Hawk. P. C.: Chap. 75, Sec. 78.
Hurd on Hab. Corp., 258–271.

It is also true that section 760 of the U. S. Revised Statutes provides for the denial by the prisoner of the facts stated in the return, or the allegation of other facts.

This, however, does not tend to show that the facts stated in the petition are not to be considered.

It is true, also, that the return merely avers the facts of the indictment, arrest and detention of the defendant on a charge of violation of the laws of Virginia, and does not deny the facts stated in the petition.

The defendant's case is stated in his petition, which, as required by section 754, U. S. Rev. Stat., "sets forth the facts concerning the detention of the party restrained, in whose custody detained, and by virtue of what claim or authority."

The return presents only the *mittimus*, *commitment*, *warrant* and *complaint*, and in no manner denies the *facts* stated in the petition.

The claim of the learned Attorney-General of Virginia would seem to be that the Court below could only consider *the regularity of the return*—that is to say, whether the jailer held the prisoner in regular process and on papers duly executed and issued in form.

If the power of the Court below were thus limited, no prisoner could ever be freed on *habeas corpus* if the return set forth regular proceedings.

On the contrary, the most common method of rendering a decision upon a question of law, such as the validity of a statute, is by *habeas corpus*.

The writ of *habeas corpus* is a summary, short way of taking the opinion of the Court upon a matter of law, where *the facts are disclosed and admitted*; it puts the case exactly in the same situation as if an action for false imprisonment were brought, and the defendant had set forth the facts to justify the imprisonment, and the plaintiff had demurred to the plea.

Church on Hab. Corp., Ch. XII., § 169, p. 217.

Wilmot's Opinions, 106.

"A motion to discharge will raise all the issues in the case."

Idem.

"On demurrer either to the petition, or on a motion to discharge, *the facts stated in the petition or in the return are conceded to be true.*"

Church on Hab. Corp., p. 218.
See also *ex parte Jenkins*, 2 Wall., C. C. R., 521.

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Office Supreme Court U. S.
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121-87

Supreme Court of the United States.

CARPER, JAILOR,
vs.
FITZGERALD.

No. 1341.

BRIEF OF WM. L. ROYALL, FOR APPELLEE.

44630

Supreme Court of the United States.

CARPER, Jailor,
vs.
FITZGERALD.

No. 1341.

BRIEF OF WM. L. ROYALL, FOR APPELLEE.

STATEMENT OF FACTS.

The facts of the case are, that Fitzgerald is a sample merchant, who travels for the house of Austin, Fields & Co., of Philadelphia, in the State of Virginia and sells their goods by sample. He tendered the State's tax-receivable coupons to the proper officer in payment of his license-tax, and demanded his license, but the coupons were refused and the license also. He thereupon proceeded with his business without a license, and he was arrested by the State's authorities for so doing. He applied to the Hon. H. L. Bond, United States Circuit Judge for the Fourth Circuit, at Baltimore, Maryland, for a writ of *habeas corpus*, upon the ground that he was held in violation of the Constitution of the United States. The learned Judge at Baltimore ordered the writ to issue from the clerk's office of the Circuit Court at Richmond, Virginia, to be returnable before himself at Baltimore. The body of the petitioner was produced before him on the day named, when, being of opinion that the prisoner was held in violation of said Constitution, he ordered his discharge, and his custodian, Carper, jailor of Pulaski county, appealed.

The ground of the prisoner's claim was, that the act of the Virginia Legislature under which he was held was contrary to the Constitution of the United States.

ARGUMENT.

The first question with which we are met is one of jurisdiction. Was it competent for the Judge at Baltimore to order the prisoner to be brought before him there from Virginia?

In Clarke's case, 100 U. S., 399, the petition was presented to Mr. Justice Strong whilst in New York, and he ordered the prisoner's body, which was detained in Cincinnati, Ohio, to be produced before him in New York. Justice Strong was not even in his own circuit. This court held that he had the power that he had exercised; that a justice of this court may issue the writ of *habeas corpus* in whatever part of the United States he may happen to be—p. 403. If a Justice of this court may issue the writ in whatever part of the United States he may happen to be, why may not a Circuit Judge issue the writ in whatever part of his circuit he may happen to be?

But section 607 of the Revised Statutes provides that the Circuit Judge shall have the same power and jurisdiction in his circuit as the Justice of the Supreme Court allotted to that circuit. The Justice of the Supreme Court for that circuit could certainly have issued the writ as the Circuit Judge issued it, (Clarke's case, *supra*,) and if he could, then the act empowers the Circuit Judge to do the same. The power of the Circuit Judge was clear, therefore, to make the order.

OUGHT THE PRISONER TO HAVE BEEN DISCHARGED?

In Royall's case, 117 U. S. R., 241, this court said, p. 252-3: "This court holds that where a person is in custody, under process from a State court of original jurisdiction, for an alleged offence against the laws of such State, and it is claimed that he is restrained of his liberty, in violation of the Constitution of the United States, the Circuit Court has a discretion whether it will discharge him upon *habeas corpus*, in advance of his trial in the court in which he is indicted."

This court refused the writ of *habeas corpus* in *Ex parte* Crouch, 112 U. S., upon the ground that the prisoner ought to make his defence in the State court, and, if denied any right which he claimed under the Constitution of the United States, that he should come to this court by appeal. But I do not understand Crouch's case to hold that it would not be competent for the Circuit Court to discharge a prisoner, even when the constitutional question would arise in the defence, if there were facts and circumstances in the case which ap-

pealed to a wise discretion for his discharge. I understand Crouch's case to proceed entirely upon a view of what is due and orderly practice, and not at all to discuss the powers of the court upon *habeas corpus*. Could it be supposed otherwise, then Royall's case, which is later, has certainly modified Crouch's in that particular. I understand Royall's case to establish the law thus: That if a prisoner be held by a State court on a charge which it is evident that the Constitution will not permit him to be held upon, the Circuit Court may discharge him, if, upon all the facts and circumstances of the case, a wise discretion would call for his discharge, even though the constitutional inhibition against his conviction will not be made to appear on his trial until his defence is set up.

But this case stands upon the impregnable ground that the appellee was arrested and held under a law which is repugnant to the Constitution of the United States. The law imposing the tax on sample merchants is part of an act approved March 6, 1886—Acts 1885–6, ch. 448, sec. 31, p. 508, printed in the appendix to this brief.

Another act, approved March 4, 1886—Acts 1885–'86, p. 467—provides that when any person wishes to get a license to do any business he shall pay the tax assessed on that business to the treasurer, who shall give him a certificate stating that he has received the money; that he shall then present that certificate to the commissioner of the revenue, who shall thereupon issue the license to him: provided, however, that if any person tender coupons for the license-tax the treasurer shall receive them for identification and verification, according to the provisions of the act of January 14, 1882. "But no license shall issue, nor shall the applicant therefor have the right to conduct any business, or pursue any profession, trade, or calling, for which such license is required by law, unless and until the said coupons shall have been verified in the manner prescribed by said act of January 14, 1882."

Now, because one legislative provision affecting a subject is contained in one chapter of the Acts of Assembly, and another legislative provision affecting the same subject is contained in another chapter, they are none the less, in substance, parts of one act. The law prescribing the tax on a sample merchant's business is to be read as though it had a proviso, that if coupons are tendered for the tax they are to be received for verification only, and the applicant is forbidden to pursue his business until they have been verified, though that should take a century, and if he does so, that he shall be punished. Here, then, clearly, the act imposing the tax is, in the outset, repugnant to the

Constitution of the United States. So that the unconstitutionality of the law under which he is prosecuted does not remain to be shown by the defendant; it stands out boldly upon the face of the act under which he is arrested. It is as though the return to the writ of *habeas corpus* had stated, "I hold him because an act of the Virginia Legislature forbids him to do business without a license after a tender of coupons, although the Constitution of the United States makes that act void."

There is but one question, therefore, to be considered, and that is, whether, under all the circumstances of the case, the Circuit Court should have exercised that discretion with which it is invested and should have discharged the prisoner?

THE PRISONER SHOULD HAVE BEEN DISCHARGED.

The Hustings Court of the city of Richmond being inferior to the Court of Appeals, it of course must take the law as the latter lays it down. That court has decided, in Jones' case (set out in the petition for *habeas corpus*), that the law under which the prisoner was being prosecuted is a constitutional enactment, although that decision was expressly in the teeth of the decision of this court in *Chaffin* vs. *Taylor*, 116 U. S. R. The Hustings Court would have been compelled to follow the decision of the Court of Appeals; so that if the prisoner had been required to make his defence in the State court, his conviction was a foregone conclusion. Why should he be compelled to undergo the vexation, annoyance, expense, and delay of a trial, conviction, appeal to the Court of Appeals, and then to this court, to vindicate a right which this court has already declared that he possesses? *Royall* vs. *Virginia*, 116 U. S. R., and *Chaffin* vs. *Taylor*, 116 U. S. R., together, have decided everything in his case, and have settled the law that he had a right to go on with his business after a tender of coupons, without a license. The remark of the learned Circuit Judge, that other travelling salesmen would occupy his ground while he was awaiting these respective decisions, is very pertinent.

But all the proceedings in the State court are a hollow mockery of justice and a sham. It would be a disgrace to civilization if citizens were compelled to submit to what the Virginia statutes and the Virginia courts contemplate before they could exercise their legal rights to use coupons for taxes. I have set out, in an appendix to this brief, the legislation of the State of Virginia on this subject, and it shows a distinct purpose to destroy these coupons as tax-paying instruments,

and all of it has been declared constitutional by her Court of Appeals.

When this legislation had proceeded no further than the act of March 13, 1884, this court used of it, in *Poindexter* vs. *Greenhow*, 114 U. S. R., at page 305, the following language: "Indeed it is quite manifest from the face of the laws themselves that they are together but parts of a larger whole. By an act of the General Assembly of Virginia, passed February 14, 1882, the Legislature restated the account between the State and its creditors on a basis of readjustment, which reduced it to the sum of $21,055,377.15, including interests in arrears to July 1, 1882, which was thereby declared to be her equitable share of the debt of the old and entire State, and in which it was also declared that the State was not able to pay interest for the future at a larger rate than three per cent. per annum. The outstanding debt, of which this was a reduction, was then classified, and bonds of the State were authorized to be issued, bearing interest at the rate of three per cent. per annum, in exchange for outstanding bonds of the different classes, scaled at rates of fifty-three per cent., sixty per cent., sixty-nine per cent., and as to one class as high as eighty per cent., which were to be retired and cancelled. The coupons on the new bonds were not made receivable in payment of taxes. To coerce creditors holding bonds issued under the act of March 30, 1871, to exchange them for these new bonds at these reduced rates, and with them to give up their security for the payment of interest arising out of the receivability of coupons in payment of taxes, is the evident purpose of the acts of January 26, 1882, and of March 13, 1884, and altogether form a single scheme, the undisguised object of which is to enable the State to rid itself of a considerable portion of its public debt, and to place the remainder on terms to suit its own convenience, without regard to the obligation it owes to its creditors.

"The whole legislation, in all its parts as to creditors affected by it and not consenting to it, must be pronounced null and void."

If that language could be justly used of it then, what may not be said of it now? All of the legislation taken together makes the following record:

An act approved January 14, 1882, which prohibits the receipt of coupons for taxes, except under and upon the following conditions, to-wit: When the coupons are presented, the amount of tax must be paid in coin or currency, and a jury must be impanelled to pass upon the question whether or not they are genuine. If the jury find them to be genuine, the coupons are to be put into the treasury and the tax-

payer's money returned to him. But this right is now no right at all, because since then the Legislature has provided that, in order to prove the coupon genuine, the bond from which it comes must be produced. Now, as the coupon is a negotiable instrument, payable to bearer, and, when detached, may belong to one person, while the bond may belong to another who is in another jurisdiction, it may be simply impossible to do this. Then they added another statute, that forbids the use of expert testimony to prove them. As the coupons are all engraved simply, and not signed, just as Bank of England notes and greenbacks are, which the act providing for them authorized, it is simply impossible to prove them genuine. Both these acts have been passed on by the Virginia Court of Appeals and held constitutional in cases now pending on the docket of this court.

An act approved January 26, 1882, which prohibits the receipt of coupons for taxes outright and unconditionally.

An act approved March 19, 1884, which provides that whenever a coupon finds its way into the State's treasury it shall be charged up against the principal of the bond from which it came, and when a sufficient amount of them have come in, the principal of that bond shall be deemed to be paid. The preamble of this last act reads as follows:

Whereas it is the intention of the General Assembly, so far as they have the power, to cause the basis of settlement provided in the act entitled an act to ascertain and declare Virginia's equitable share of the debt created before and actually existing at the time of the partition of her territory and resources, and to provide for the issuance of bonds covering the same, and the regular and prompt payment of interest thereon, approved February 14, 1882, *to apply alike to all the holders of the bonds of the State;* and whereas many holders of the bonds have not accepted the provisions of said act, *by reason whereof it has been impossible to prevent coupons being paid into the treasury for taxes*, the holders of the tax-receivable coupon bonds in that way enforcing payment of a higher rate of interest than is provided by the above-recited act, be it therefore enacted, &c.

Joint resolutions of both houses of the Legislature, approved by the Governor, December 21, 1883, as follows:

"The questions of the ascertainment and settlement of the debt of the State having for thirteen years profoundly agitated the people of Virginia, persistent, repeated, and earnest but unavailing, efforts having been made by a large body of the citizens and tax-payers of the State to effect and carry out a settlement of this debt, under which a

much larger sum would have been recognized and assumed by the State than has been assumed by the act approved February 14, 1882, popularly called the 'Riddleberger Bill,' resulting in political contests which have convulsed the popular mind, given repeated and ruinous shocks to the business interests of the State, retarded the prosperity and threatened the safety of the people, and all of the issues involved in the final adjustment of this debt, having at length in the years 1881 and 1882 and 1883, after years of discussion and controversy, been submitted to the arbitrament of the people and the courts, and the people having, after thorough canvass of the questions of fact and right involved, given their sanction at the polls to the measures, modes, and principles of settlement substantially involved in the 'Riddleberger Bill,' and the highest courts of Virginia and of the United States having sanctioned the validity and constitutionality of the law designed to give effect to the adjustment thus enacted; and it being of imperative importance to the people of Virginia, and essential to the security of the public creditors, that this settlement shall be taken as a finality, and that further agitation and controversy shall cease; therefore,

"1. Be it resolved by the General Assembly of Virginia, That the people of Virginia have accepted the act of February 14, 1882, known as the 'Riddleberger Bill,' as the ultimate settlement of the debt of this State; that it is their unalterable purpose that that settlement shall be final, and that any expectations that any settlement of the debt of this State upon any other basis will ever be made or tolerated by the people of Virginia is absolutely illusory and hopeless.

"2. That the interests of the public creditors as well as the safety and welfare of the State require that this settlement shall be accepted by the creditors as well as by the State, and therefore the General Assembly of Virginia, on behalf of all the people of the State, hereby advise and call upon the holders of the bonds and claims against the Commonwealth to come forward with promptness and fund the same under the provisions of the act of February 14, 1882."

An act approved February 7, 1884, as amended by one approved February 25, 1884, prohibiting the payment of any license-taxes in coupons.

The 65th section of chapter 459 of the Acts of 1883-4, which forbids any person to sell the State's tax receivable coupons without first taking out a special license to do so, for which license he is required to pay the sum of $1,000, and in addition thereto he is required to pay the sum of twenty per cent. upon the face value of all he may sell.

The before-mentioned act of January 26, 1882, forbade any court to enjoin a collector from forcibly compelling a tax-payer to pay his tax in money after the coupons had been tendered; and the third section of an act approved March 13, 1884, forbade any person to sue a collector for trespass on account of his levying, or seizing, and selling a tax-payer's property after he had tendered coupons for his taxes.

An act approved February 26, 1886, which, in substance, undertakes to punish any person who aids or advises any suit aimed at making coupons available. This act pretends to apply generally; but, taken in connection with all the other legislation, its purpose is manifest, and it is enforced against those who are connected with coupons only.

An act approved March 1, 1886, which, in substance, undertakes to punish any attorney at law who gives the benefit of his skill and knowledge of his profession to any person seeking to avail himself of the right to pay his taxes with coupons. This act pretends to apply to all attorneys, but it is enforced against those connected with coupons only. [See my affidavit at end of this brief.] The State thus forces a law-suit on the coupon-holder, and then forbids him the aid of a lawyer.

An act of February 24, 1886:

"Chap. 216.—An act authorizing a board, consisting of the Attorney-General, Secretary of the Commonwealth, Auditor of Public Accounts, Second Auditor, and Treasurer, to allow to tax-collecting officers losses and expenses incurred in collecting or attempting to enforce or settle taxes due the Commonwealth.

"1. Be it enacted by the General Assembly of Virginia, That upon the application of any officer charged with the duty of collecting or settling taxes due the Commonwealth, a board, consisting of the Attorney-General, Secretary of the Commonwealth, Auditor of Public Accounts, Second Auditor, and Treasurer, shall be authorized to ascertain and allow to such officer such sum or sums of money as they may deem just and proper to cover any liability and expenses incurred by, and any loss or damage accrued to such officer, as the result of his collecting or attempting to collect, enforce, or settle taxes due the Commonwealth; and for the amount so ascertained and allowed, the Auditor shall draw his warrant in favor of such officer upon the Treasurer, and the same shall be paid out of money in the treasury not otherwise appropriated. The said board may prescribe rules and regulations in reference to such applications and allowances if they shall deem proper so to do; but no such allowance shall be made unless the

said board shall be satisfied that such officer used due diligence in protecting and defending the interests of the Commonwealth in the matter touching which such allowance is asked for.

"2. In case any such allowance is applied for by the Auditor, it shall be competent for the other members of said board to pass upon and allow the same with the same effect as if the Auditor were not a member of said board; but the Auditor shall not act as a member of said board in passing upon his own claim.

"3. This act shall be in force from its passage."

The Legislature of Virginia intended to encourage by this statute county and corporation treasurers to levy on and sell the property of any tax-payer who shall tender the State's tax-receivable coupons in payment of his taxes, and refuse to pay anything else, and to encourage prosecuting officers, grand juries, and State courts to prosecute all persons who tendered the State's coupons for license-taxes and proceeded with their business thereafter without license, by giving them to understand that they would be indemnified out of the treasury of the State for all loss or damage to which they might be put by such unlawful acts.

The Auditor of Public Accounts, the Second Auditor, the Secretary of the Commonwealth, and the Attorney-General construed this act as directing them to instruct all county and corporation treasurers of the State to levy on, seize, and sell the property of any tax-payer who should offer to pay his taxes with the State's coupons, and accordingly, on the 23d day of March, 1886, they issued to each treasurer in the State the following instructions:

CIRCULAR.

OFFICE OF THE AUDITOR OF PUBLIC ACCOUNTS,
RICHMOND, March 23, 1886.

To the Treasurers of the Counties and Corporations of the Commonwealth:

The following instructions are given for your guidance:

1. If coupons are tendered in payment of capitation tax, or in payment of the tax on land or personal property assessed for the support of public free schools, the treasurer will refuse to receive them and require payment in gold or silver coin, United States treasury notes, or national bank notes. Should such payment not be made, the treasurer will levy for such tax.

2. If coupons are tendered for the tax on land or personal property assessed for the support of government, and at the same time payment of the said tax is made in gold or silver coin, United States treasury notes, or national bank notes, the treasurer will receive the coupons for identification and verification, as directed by the act of January 14, 1882, commonly known as Coupon Killer No. 1. If such payment in money be not made, the treasurer will decline to receive the coupons for identification and verification, and will levy for said tax.

3. If coupons are tendered for the sum prescribed by law as a condition precedent to the issuing of a license, and the said sum be at the same time deposited in gold or silver coin, United States treasury notes, or national bank notes, the treasurer will receive the coupons for identification or verification, in accordance with the provisions of said act of January 14, 1882, (Coupon Killer No. 1,) and will give the certificate necessary to enable application to be made for the license. Should the party tendering the coupons decline to make the said deposit in gold or silver coin, or United States treasury notes, or national bank notes, the treasurer will, nevertheless, receive the coupons for identification and verification, in accordance with said act of January 14, 1882, and forward them to the county or corporation court; and when the coupons are returned to him, with a copy of the order of the court certifying that they have been proved to be genuine, legal coupons, receivable for taxes, he will give the certificate required, to enable application to be made for a license; but he will not give said certificate until he receives said order of the court.

4. When coupons are tendered and not received by the treasurer under these instructions, the treasurer shall record the bond number, coupon number, and amount and date of each of such coupons, and preserve said record.

5. If any person shall engage in or exercise any business, employment or profession, without a license, if a license be required by law, he shall be reported by the treasurer to the attorney for the Commonwealth, who will proceed against him according to law, and prosecute the suit to a conclusion, without compromise or case agreed.

6. If any treasurer shall be sued by any tax-payer, or his agent or representative, for discharging the duties of his office according to the instructions given above, it shall be the duty of the attorney for the Commonwealth for the court in which such suit may be brought, or the Attorney-General, if such suit is brought in the Circuit Court of the city of Richmond or in the Circuit Court of the United States, when notified by the treasurer, to defend it as for an officer of the

State who has done his duty under the law; and if damages are found against such an officer, he will be relieved according to the provisions of an act approved February 24, 1886, entitled "An act authorizing a board, consisting of the Attorney-General, Secretary of the Commonwealth, Auditor of Public Accounts, Second Auditor, and Treasurer, to allow collecting officers' losses and expenses incurred in collecting or attempting to enforce or settle taxes due the Commonwealth," when the said board shall be satisfied that such officer used due diligence in protecting and enforcing the interests of the Commonwealth in the matter touching which such allowance is asked.

Very respectfully.

MORTON MARYE,
Auditor of Public Accounts.

We approve the foregoing instructions:

F. G. RUFFIN, *Second Auditor.*
R. A. AYRES, *Attorney-General.*
H. W. FLOURNOY, *Secretary of the Commonwealth.*
MORTON MARYE, *Auditor of Public Accounts.*
A. W. HARMAN, JR., *Treasurer of the Commonwealth.*

Members of the Board of Indemnity.

With this condition of things existing in Virginia and sanctioned by her courts, would it not be a mockery to require persons prosecuted under her unconstitutional laws to bear the burden of making defences in her courts? The doctrine announced by this court, which requires parties to make defence in the State courts, is intended for cases where there is an honest and *bona fide* difference of opinion as to whether the law is constitutional—not to cases where the State Legislature and the State authorities are avowedly seeking to coerce parties into abandoning their constitutional rights.

In *U. S.* vs. *Pacific R. R. Co.*, 91 U. S. R., 79, this court said: "But courts, in construing a statute, may with propriety recur to the history of the time when it was passed; and this is frequently necessary in order to ascertain the reason as well as the meaning of particular provisions in it."

In the slaughter-house cases, speaking of the war amendments to the Constitution, this court says, 16 Wall., 67: "The most cursory glance at these articles discloses a unity of purpose, when taken in connection with the history of the times, which cannot fail to have an important bearing upon any question of doubt concerning their true

meaning. Nor can such doubts, when any reasonably exist, be safely and rationally solved without a reference to that history; for in it is found the occasion and the necessity for recurring again to the great source of power in this country—the people of the States—for additional guarantees of human rights, additional powers to the Federal Government, additional restraints upon those of the States. Fortunately that history is fresh within the memory of us all, and its leading features, as they bear upon the matter before us, free from doubt."

In *Ohio*, &c., vs. *Debolt*, 16 Am., this court said, p. 435: "For it is a matter of public history, which this court cannot refuse to notice, that almost every bill for the incorporation of banking companies, insurance and trust companies, railroad companies, or other corporations, is drawn originally by the parties who are personally interested in obtaining the charter."

The third paragraph of the syllabus of *Brown* vs. *Piper*, 91 U. S. R., 37, is as follows: "The court can take judicial notice of a thing in the common knowledge and use of the people throughout the country."

In *Ex parte* Milligan, 4 Wall., this court said, at page 114: "In interpreting a law, the motives which must have operated with the Legislature in passing it are proper to be considered." The court then proceeds to discuss the history of the times, as showing what state of facts Congress had before it when it passed the act under consideration, and what the act must therefore have been intended to accomplish.

If the act of March 19, 1884, and the joint resolutions of December 21, 1883, did not unequivocally declare the purpose that actuated the Legislature in enacting these statutes, the history of the times would fully disclose that purpose. Everybody knows that for the past five years every department of the government of the State of Virginia has been under the control of a political party bent and determined on ridding the State of her obligation to receive her coupons in payment of her taxes. The fifteenth section of the act of February 14, 1882, (the act providing for the new funding of the debt,) forbids the State's officers to pay interest upon any bonds except those issued under its provisions; and starting with this repudiation of her obligation to redeem the coupons in money, it is not possible to doubt that all the other acts quoted were passed to prevent the coupon being used as a tax-paying instrument. The whole history of the day proves that to a demonstration.

WILLIAM L. ROYALL,
for Appellee.

APPENDIX.

Joint resolutions of both houses of the Legislature, approved by the Governor, December 21, 1883, as follows:

"The questions of the ascertainment and settlement of the debt of the State having for thirteen years profoundly agitated the people of Virginia, persistent, repeated, and earnest but unavailing, efforts having been made by a large body of the citizens and tax-payers of the State to effect and carry out a settlement of this debt, under which a much larger sum would have been recognized and assumed by the State than has been assumed by the act approved February 14, 1882, popularly called the 'Riddleberger Bill,' resulting in political contests which have convulsed the popular mind, given repeated and ruinous shocks to the business interests of the State, retarded the prosperity and threatened the safety of the people, and all of the issues involved in the final adjustment of this debt, having at length, in the years 1881 and 1882 and 1883, after years of discussion and controversy, been submitted to the arbitrament of the people and the courts, and the people having, after thorough canvass of the questions of fact and right involved, given their sanction at the polls to the measures, modes, and principles of settlement substantially involved in the 'Riddleberger Bill,' and the highest courts of Virginia and of the United States having sanctioned the validity and constitutionality of the law designed to give effect to the adjustment thus enacted; and it being of imperative importance to the people of Virginia, and essential to the security of the public creditors, that this settlement shall be taken as a finality, and that further agitation and controversy shall cease: therefore,

"1. Be it resolved by the General Assembly of Virginia, That the people of Virginia have accepted the act of February 14, 1882, known as the 'Riddleberger Bill,' as the ultimate settlement of the debt of this State; that it is their unalterable purpose that that settlement shall be final, and that any expectations that any settlement of the debt of this State upon any other basis will ever be made or tolerated by the people of Virginia is absolutely illusory and hopeless.

"2. That the interests of the public creditors as well as the safety and welfare of the State require that this settlement shall be accepted by the creditors as well as by the State, and therefore the General Assembly of Virginia, on behalf of all the people of the State, hereby advise and call upon the holders of the bonds and claims against the Commonwealth to come forward with promptness and fund the same under the provisions of the act of February 14, 1882."

CHAP. 540.—An ACT to provide a Sinking Fund for Tax-Receivable Coupon Bonds.

Approved March 19, 1884.

Wheras it is the intention of the General Assembly, so far as they have the power, to cause the basis of settlement provided in the act entitled an act to ascertain and declare Virginia's equitable share of the debt created before, and actually existing at the time of, the partition of her territory and resources, and to provide for the issuance of bonds covering the same, and the regular and prompt payment of interest thereon, approved February fourteenth, eighteen hundred and eighty-two, to apply alike to all the holders of the bonds of the State; and whereas many of the holders of the bonds have not accepted the provisions of said act, by reason whereof it has been impossible to prevent coupons being paid into the treasury for taxes, the holders of the tax-receivable coupon bonds in that way enforcing the payment of a higher rate of interest than is provided by the above-recited act: therefore,

1. Be it enacted by the General Assembly of Virginia, That the Second Auditor shall open an account in his office, to be known as the tax-receivable coupon bond sinking fund account, in which he shall be required to enter the number, amount, and date of each coupon that may be paid into the treasury for taxes; and he shall ascertain what amount of each of such coupons that may thus be paid into the treasury would have been payable under the act recited in the preamble to this act, if the bond from which the coupon was clipped had been funded under said act, which amount, so ascertained, he shall deduct from the amount of the coupon, and the balance remaining shall be charged to the bond from which the coupon was clipped, as a payment upon the principal of such bond, and shall be deducted from the same at maturity.

2. This act shall be in force from its passage.

CHAP. 450, Sec. 65, of the Acts of 1883-4.—Tax-receivable Coupon Brokers.

65. No person shall sell tax-receivable coupons from bonds of the State of Virginia without a special license, for which privilege he shall pay one thousand dollars for each office or place of business kept for that purpose. In addition thereto, he shall pay to the State a tax of twenty per centum upon the face value of all tax-receivable coupons sold by him. At the time of making such sales he shall give to the purchaser a printed certificate, signed by him, stating the fact that he has sold such coupons to the purchaser, naming him. The said certificate shall also contain the number and amounts of the said coupons and the date of sale. Whenever such coupons are tendered for taxes, the broker's certificate shall be delivered to the collector. The said collector shall preserve the same until the first day of the following month, when he shall collect the said tax of twenty per centum

from the said broker. But any stock-broker may purchase such coupons for the purpose of funding them in new three per centum bonds of Virginia.

The Court of Appeals of Virginia has decided this act to be constitutional.

CHAP. 238.—An ACT to define and punish Champerty.

Approved February 26, 1886.

1. Be it enacted by the General Assembly of Virginia, That any person who shall solicit, procure or induce, or become a party to soliciting, procuring or inducing, any suit or action to be brought, any petition to be filed, or any motion to be made against the State of Virginia, or any citizen thereof, by verbal representation, or by writing or printing, shall be deemed guilty of the offence of champerty, and upon conviction thereof shall be adjudged guilty of a misdemeanor, and shall be punished by a fine of not less than one hundred nor more than three hundred dollars for each offence, or by imprisonment for not more than sixty days, or by both, in the discretion of the jury.

2. This act shall be enforced from its passage.

CHAP. 347.—An Act to define and punish Barratry.

Approved March 1, 1886.

1. Be it enacted by the General Assembly of Virginia, That any person licensed to practice law in any of the courts of this Commonwealth, who shall solicit, procure or induce, or, become a party to soliciting, procuring or inducing, any suit or action to be brought, any petition to be filed, or any motion to be made against the State of Virginia, or any citizen thereof, by verbal representations; or by writing or printing, shall be deemed guilty of the offence of barratry.

2. That when, upon the complaint of the State, through any of its officers, or of any other defendant in a suit or petition, it shall appear to the Commonwealth's attorney, in any court of the Commonwealth, that there is reasonable ground to suspect the perpetration of such offence, it shall be his duty to summon the plaintiff on petition, his agent or agents, and any other witness he may think proper to summon, to testify in the case; and if it shall appear that the plaintiff or petitioner's counsel has solicited, procured or induced such suit or petition, or become a party thereto, then it shall be the duty of the court to declare such counsel guilty of barratry; and it shall revoke his license, and disbar him forever from practicing law in the courts of this Commonwealth.

3. This act shall be enforced from its passage.

CHAP. 45.—An ACT to amend and re-enact section 39 of chapter 167, Code 1873, in relation to rules, pleadings, and evidence.

Approved January 21, 1886.

1. Be it enacted by the General Assembly of Virginia, That section thirty-nine of chapter one hundred and sixty-seven of the Code of eighteen hundred and seventy-three, in relation to rules, pleadings, and evidence, be amended and re-enacted so as to read as follows:

§ 39. Where a bill, declaration, petition, or other pleading, alleges that any person made, endorsed, assigned, or accepted any writing, no proof of the handwriting of such person shall be required, unless the fact be denied by affidavit, with the answer, plea, or other pleadings which puts it in issue: provided, that no such affidavit shall be required where the signature of the maker, endorser, assignor, or accepter of any paper is not in the personal handwriting of the party to be charged, or his agent, but was made by machinery, or in other manner than by the actual or personal handwriting of the party to be charged, or his agent; then in all such cases the burden of proving such paper to be genuine shall be upon the party relying upon the paper so offered to be read in evidence; and it is further provided, that expert evidence shall not be received to prove the genuineness of any paper or instrument made by machinery, or in any other manner than by the actual or personal handwriting of the party to be charged, or his agent.

2. All acts and parts of acts inconsistent with this act are hereby repealed.

3. This act shall be in force from its passage.

This act has been declared constitutional by the Court of Appeals of Virginia.

CHAP. 49—An ACT to prescribe a rule of evidence in certain cases.

Approved January 26, 1886.

1. Be it enacted by the General Assembly of Virginia, That in the trial of any issue involving the genuineness of a coupon, appearing or purporting to have been cut from any bond authorized by law to be issued by the State of Virginia, or by any city, county, or corporation, the defendant may demand the production of the bond; and thereupon it shall be the duty of the plaintiff to produce such bond, with proof that the coupon was actually cut therefrom.

2. This act shall be enforced from its passage.

This act has been declared constitutional by the Virginia Court of Appeals.

CHAP. 41.—An ACT to provide for the more efficient collection of the revenue to support government, maintain the public schools, and to pay interest on the public debt.

Approved January 26, 1882.

1. Be it enacted by the General Assembly of Virginia, That the several tax-collectors of this Commonwealth shall receive in discharge of the taxes, license-taxes, and other dues, gold, silver, United States treasury notes, national bank currency, and nothing else: provided that in all cases in which an officer charged by law with the collection of revenue due the State shall take any steps for the collection of the same, claimed to be due from any citizen or tax-payer, such person against whom such step is taken, if he conceives the same to be unjust or illegal, or against any statute, or to be unconstitutional, may pay the same under protest, and under such payment the officer collecting the same shall pay such revenue into the State treasury, giving notice at the time of such payment to the Treasurer that the same was paid under protest. The person so paying such revenue may at any time within thirty days after making such payment, and not longer thereafter, sue the said officer so collecting such revenue, in the court having jurisdiction of the parties and amounts. If it be determined that the same was wrongfully collected, for any reason going to the merits of the same, then the court trying the case may certify of record that the same was wrongfully paid and ought to be refunded; and thereupon the Auditor of Public Accounts shall issue his proper warrant for the same, which shall be paid in preference to other claims on the treasury, except such as have priority by constitutional requirement. There shall be no other remedy in any case of the collection of revenue, or the attempt to collect revenue illegally, or the attempt to collect revenue in funds only receivable by said officers under this law, the same being other and different funds than the tax-payer may tender or claim the right to pay, than such as are herein provided; and no writ for the prevention of any revenue claim, or to hinder or delay the collection of the same, shall in anywise issue, either injunction, supersedeas, mandamus, prohibition, or any other writ of process whatever; but in all cases for any reason any person shall claim that the revenue so collected of him was wrongfully or illegally collected, the remedy for such person shall be as above provided, and in no other manner. In all such cases, if the court certify of record that the officer defendant acted in good faith and diligently defended the action, the necessary costs incurred by him shall be taxed to and paid by the State, as in criminal cases. The Commonwealth's attorney for the county or corporation in which suit is brought shall appear and represent the defence. In every case where judgment is rendered for the defendant, a fee of five dollars shall be taxed in favor of said attorney and against the plaintiff; and whenever the court shall refuse to certify the good faith and diligence of the officer defending the case, a like fee of five dollars shall be taxed against the said officer. Any officer charged with the collection of revenue, who shall receive payment thereof in anything other than

that hereinbefore provided, shall be deemed guilty of a misdemeanor, and fined not less than one hundred nor more than five hundred dollars, in the discretion of the court; but nothing herein contained shall be construed to subject any officer of the State to any suit, other than as hereinbefore provided, for any refusal on his part to accept in payment of revenue due the State any kind or description of funds, security, or paper not authorized by this act.

2. This act shall be in force from and after the first day of December, eighteen hundred and eighty-two.

CHAP. 421, Section 3.—Of an ACT to amend the act approved January 26, 1882, entitled an act to provide for the more efficient collection of the revenue, &c.

Approved March 13, 1884.

§ 3. No action of trespass or trespass on the case shall be brought or maintained against any collecting officer for levying upon the property of any tax-payer who may have tendered in payment, in whole or in part, any coupons or paper purporting to be a coupon, cut from bonds of this State for such taxes, and who shall refuse to pay his taxes in gold, silver, United States treasury notes, or national bank notes. The suit contemplated by this act shall be commenced by a petition filed at rules, upon which a summons shall be issued to the collecting officer; and the said suit shall be regularly matured like other actions at law, and the coupons tendered shall be filed with said petition.

CHAP. 397.—An ACT to give an appeal as of right to the Commonwealth in all cases where suits are instituted under the act approved January 14, 1882, entitled an act to prevent frauds against the Commonwealth and the holders of her securities in the collection and disbursement of revenues.

Approved March 12, 1884

1. Be it enacted by the General Assembly of Virginia, That in all proceedings in any court of the Commonwealth, under the act approved January fourteenth, eighteen hundred and eighty-two, entitled an act to prevent frauds on the Commonwealth, and the holders of her securities in the collection and disbursement of revenues, and under the act approved January twenty-sixth, eighteen hundred and eighty-two, entitled an act to provide for the more efficient collection of the revenue to support the government, maintain the public schools, and to pay interest on the public debt, it shall be the duty of the attorneys for the Commonwealth to defend the suits, and if a case be decided against the Commonwealth it shall be his duty to appeal to the court above, and such appeal shall be a matter of right; and where an appeal is taken to the Court of Appeals it shall be the duty of the clerk of the Circuit Court from which the appeal is taken to deliver a

copy of the record to the clerk of the Court of Appeals as soon as practicable, in like manner as is provided in the sixteenth section of chapter one hundred and seventy-eight of the Code of eighteen hundred and seventy-three in the cases of appeal to the Circuit Courts.

2. In all suits arising under the aforesaid acts, which may be brought into the Federal Courts, it shall be the duty of the Attorney-General to appear as counsel for the Commonwealth, or the collector of taxes, to defend such suits, and if the judgment be against the Commonwealth, or the collector of taxes, to take an appeal to the Supreme Court of the United States.

3. Any Commonwealth's attorney failing to carry out the provisions of this act shall be deemed guilty of a misdemeanor, and shall be fined not less than fifty nor more than one hundred dollars.

4. This act shall be in force from its passage.

CHAP. 53.—An ACT to provide compensation to Wyndham R. Meredith for services rendered the Commonwealth.

Approved January 28, 1886.

1. Be it enacted by the General Assembly of Virginia, That the Auditor of Public Accounts be and is authorized and directed to draw his warrants upon the Treasurer for seven hundred and fifty dollars, payable out of any money in the treasury not otherwise appropriated, in favor of Wyndham R. Meredith, Esquire, attorney in coupon cases for the city of Richmond, in payment for his services rendered to the State at the request of the Board of Sinking Fund Commissioners, in cases in the Supreme Court of Appeals, and in the Circuit Court of the United States, involving the constitutionality of the statute allowing appeals in all coupon cases, and of the statutes requiring the portion of the taxes set aside by the Constitution for the maintenance of the public free schools to be paid in money, and of the statutes requiring the license-tax to be paid in money, and of the statute requiring a special license of persons selling coupons, and in other cases argued at the request of the Board of Sinking Fund Commissioners.

2. This act shall be enforced from its passage.

AFFIDAVIT OF WILLIAM L. ROYALL.

William L. Royall, being first duly sworn, deposes and says that he was attorney for the plaintiffs in the cases of *Willis* vs. *Miller* and *Strickler* vs. *Yager*, tried in the Circuit Court of the United States for the Eastern District of Virginia, and reported in the *Federal Reporter*, published at St. Paul, Minnesota, vol. 29, p. 238, for Tuesday, January 18, 1887, No. 6. That the said report is a correct report of the trial of said causes. That in the course of the trials the

Hon. R. A. Ayres, Attorney-General for the State of Virginia, who represented the defendants in said causes, said to the Circuit Judge who presided at the trial, in substance, as follows: "After the Supreme Court of the United States made its decisions in 1886, in *Royall* vs. *Virginia* and *Barry* vs. *Edmunds*, the Legislature of Virginia was sitting, and I was before the committee having charge of the whole subject of the State's debt. I explained those decisions thoroughly to said committee, and it resolved upon the policy of resisting them. Subsequently the Legislature resolved upon the same policy, and the act providing for the Board of Indemnity was the result of this resolution then arrived at." The said Ayres referred to chapter 216 of the Acts of 1885-'86. That on the same trials Morton Marye, Auditor of Virginia, F. G. Ruffin, Second Auditor thereof, A. W. Harman, Treasurer thereof, H. W. Flournoy, Secretary of the Commonwealth, and R. A. Ayres, Attorney-General thereof, testified that they had signed the circular which follows, that it had been sent to all the county and corporation treasurers in the State, and that it was then (in October, 1886,) still in force, and all of the above named, except R. A. Ayres, testified that they intended to continue it in force.

The circular referred to is in the following words and figures, to wit:

CIRCULAR.

OFFICE OF THE AUDITOR OF PUBLIC ACCOUNTS,
RICHMOND, March 23, 1886.

To the Treasurers of the Counties and Corporations of the Commonwealth:

The following instructions are given for your guidance:

1. If coupons are tendered in payment of capitation tax, or in payment of the tax on land or personal property assessed for the support of public free schools, the treasurer will refuse to receive them and require payment in gold or silver coin, United States treasury notes, or national bank notes. Should such payment not be made, the treasurer will levy for such tax.

2. If coupons are tendered for the tax on land or personal property assessed for the support of government, and at the same time payment of the said tax is made in gold or silver coin, United States treasury notes, or national bank notes, the treasurer will receive the coupons for identification and verification, as directed by the act of

January 14, 1882, commonly known as Coupon Killer No. 1. If such payment in money be not made, the treasurer will decline to receive the coupons for identification and verification, and will levy for said tax.

3. If coupons are tendered for the sum prescribed by law as a condition precedent to the issuing of a license, and the said sum be at the same time deposited in gold or silver coin, United States treasury notes, or national bank notes, the treasurer will receive the coupons for identification or verification, in accordance with the provisions of said act of January 14, 1882, (Coupon Killer No. 1,) and will give the certificate necessary to enable application to be made for the license. Should the party tendering the coupons decline to make the said deposit in gold or silver coin, or United States treasury notes, or national bank notes, the treasurer will, nevertheless, receive the coupons for identification and verification, in accordance with said act of January 14, 1882, and forward them to the county or corporation court; and when the coupons are returned to him, with a copy of the order of the court certifying that they have been proved to be genuine, legal coupons, receivable for taxes, he will give the certificate required, to enable application to be made for a license; but he will not give said certificate until he receives said order of the court.

4. When coupons are tendered and not received by the treasurer under these instructions, the treasurer shall record the bond number, coupon number, and amount and date of each of such coupons, and preserve said record.

5. If any person shall engage in or exercise any business, employment or profession, without a license, if a license be required by law, he shall be reported by the treasurer to the attorney for the Commonwealth, who will proceed against him according to law, and prosecute the suit to a conclusion, without compromise or case agreed.

6. If any treasurer shall be sued by any tax-payer, or his agent or representative, for discharging the duties of his office according to the instructions given above, it shall be the duty of the attorney for the Commonwealth for the court in which such suit may be brought, or the Attorney-General, if such suit is brought in the Circuit Court of the city of Richmond or in the Circuit Court of the United States, when notified by the treasurer, to defend it as for an officer of the State who has done his duty under the law; and if damages are found against such an officer, he will be relieved according to the provisions of an act approved February 24, 1886, entitled "An act authorizing a board, consisting of the Attorney-General, Secretary

of the Commonwealth, Auditor of Public Accounts, Second Auditor, and Treasurer, to allow collecting officers' losses and expenses incurred in collecting or attempting to enfore or settle taxes due the Commonwealth," when the said board shall be satisfied that such officer used due diligence in protecting and enforcing the interests of the Commonwealth in the matter touching which such allowance is asked. Very respectfully.

MORTON MARYE,
Auditor of Public Accounts.

We approve the foregoing instructions:

F. G. RUFFIN, *Second Auditor.*
R. A. AYRES, *Attorney-General.*
H. W. FLOURNOY,
Secretary of the Commonwealth.
MORTON MARYE,
Auditor of Public Accounts.
A. W. HARMAN, JR.,
Treasurer of the Commonwealth.

} *Members of the Board of Indemnity.*

That more than fifty tax-payers in the State of Virginia tendered the State's tax-receivable coupons for taxes during the Spring of 1886, and refused to pay with anything else. That the county and corporation treasurers levied upon their property, seized and sold it, notwithstanding said tender. That affiant sued said treasurers in the United States Circuit Court for the Eastern District of Virginia for damages for said levies. That the actions were tried in the month of October, 1886, and resulted in a verdict for damages in each case. That the plaintiff in each of said actions was summoned before the grand juries for the January and February terms of the Hustings Court of the city of Richmond, to furnish evidence against affiant upon which he might be indicted under the act defining barratry. That the investigations resulted in five indictments being found against him for barratry in bringing five of said suits above mentioned. That affiant has made diligent inquiry, and he has not learned of a single instance in which any Commonwealth's attorney in the State of Virginia has made any effort to procure an indictment against any attorney at law under said statute except attorneys asserting rights based upon said coupons; nor has any grand jury found any indictment under it save and except against such attorneys. That the same is true of the act providing for champerty.

A copy of the above affidavit, duly sworn to, is filed with the clerk.

The following is the act called in question in this case:

CHAPTER 415.—AN ACT to prevent frauds upon the Commonwealth, and the holders of her securities, in the collection and disbursement of revenue; and to repeal section 112 of an act approved March 15, 1884, entitled an act to provide for the assessment of taxes, &c.; and to repeal an act approved February 7, 1884, entitled an act to regulate the granting of licenses, &c.; and to repeal an act approved February 25, 1884, entitled an act to regulate granting of license, &c.

Approved, March 4, 1886.

1. Be it enacted by the General Assembly of Virginia, That every person or firm, partnership or association, express, telegraph, telephone, and every incorporated company, which now is or may be required to obtain a license, in order to do business in this State, desiring to obtain such license, shall make application therefor, in writing, to the commissioner of the revenue of the county or corporation wherein such business is proposed to be conducted, or to the Auditor of Public Accounts, in such cases as he is authorized by law to issue a license, in which application it shall be stated the nature of the business, the residence of the applicant, the place where it is proposed to conduct such business, the amount of the assessment prescribed by law as a condition precedent to the issuing of such license, accompanied by the certificate, in writing, by the treasurer of the county or corporation wherein such business is proposed to be conducted, stating that said amount, in coin, legal-tender notes, or national bank bills, has been deposited with him by said applicant: provided, however, in such cases as the Auditor of Public Accounts is authorized by law to issue licenses, such deposit as herein provided for shall be made with him at the time such application is presented, instead of with the treasurer: provided, that if such applicant shall make tender of any papers or instruments, in print, writing, or engraving, purporting to be coupons detached from bonds of the Commonwealth issued under the act approved thirtieth day of March, eighteen hundred and seventy-one, entitled an act to fund the public debt, or under the act approved March twenty-eighth, eighteen hundred and seventy-nine, entitled an act to provide a plan of settlement of the public debt, in payment of any such assessment prescribed by law, the treasurer or auditor, as the case may be, to whom such tender is made, shall receive such coupons for identification and verification, in accordance with the provisions of act of Assembly approved January fourteen, eighteen hundred and eighty-two, entitled an act to prevent fraud upon the Commonwealth and the holders of her securities, in the collection and disbursement of revenues. But no license shall issue, nor shall the applicant therefor have the right to conduct any business, or pursue any profession, trade or calling, for which such license is required by law, unless and until the said coupons shall have been verified in the manner prescribed by said act of fourteenth January, eighteen hundred and eighty-two.

§ 2. Upon the receipt by the commissioner of the revenue or Auditor, as the case may be, of an application of a person or firm, partnership or company, who has complied with the foregoing section, he shall endorse said application, as follows: I find the within application correct and in due form, and accompanied with the certificate in writing of the

treasurer of the county or corporation; that the sum of ——— dollars in gold or silver coin, or United States treasury or national bank notes, has been deposited with the said treasurer; or that coupons have been tendered by the applicant, and verified as required by the first section of this act; or that same accompanied the application and was deposited with the Auditor, as the case may be, to which endorsement he shall sign his name and file said application in his office, furnishing the applicant with a duplicate copy of the same. If it shall appear that all the provisions of this act have been complied with, then the court or person having authority to grant or issue such license may hear the application, and, if in due form, may grant such license: provided, that in case such license shall be refused, such refusal shall be entered upon such application, and the same returned to the applicant, who, upon presenting said application, endorsed with such refusal, to the officer with whom the deposit was made, shall have the same returned to him by the said officer.

§ 4. No application for a license to do any business or to follow any profession, trade, or calling in this State shall be made, and if made, shall not be considered, except in pursuance of this act, and no such license shall be granted unless all the requirements of this act shall have been first complied with; and any license granted or obtained in violation of the provisions of this act shall be null and void, and the person or persons, firm or association, joint stock or incorporated company, which may obtain such license, and attempt to do business thereunder, shall be deemed to violate the law, and shall be liable to all forfeitures, pains, and penalties for such violations, and in the same manner as if no such license had been obtained, and in addition thereto fined not less than fifty dollars nor more than five hundred dollars.

2. Any assessor, treasurer, or other officer, charged with any duty pertaining to the granting of licenses, who shall violate this act, shall be guilty of a misdemeanor, and upon conviction thereof shall be fined not less than fifty nor more than five hundred dollars.

3. The Auditor of Public Accounts shall forthwith have prepared and furnished to commissioners of the revenue of this State blank forms of applications for licenses, required to be made in writing by this act.

4. Section one hundred and twelve of an act approved March fifteenth, eighteen hundred and eighty-four, entitled an act to provide for the assessment of taxes on persons, property, and income, and imposing taxes thereon for the support of the government and public free schools, and to pay the interest on the public debt, and to provide for the mode of applying for licenses to transact any business in this State, and prescribing the amount to be paid as a condition precedent to the right to transact such business; and an act entitled an act to regulate the granting of licenses for the exercise of any privilege, approved February seventh, eighteen hundred and eighty-four; and an act entitled an act to amend and reenact sections one and two of an act entitled an act to regulate the granting of licenses for the exercise of any privilege, approved twenty-fifth of February, eighteen hundred and eighty-

5. This act sha

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Supreme Court of the United States.

H. A. CARPER

vs. No. 1,341.

R. L. FITZGERALD.

Brief of Wm. L. Royal in reply to brief of attorney General Ayers.

1. If the Circuit Judge had power to award the writ in Baltimore, it is of no consequence whether papers under which Carper held the prisoner would have justified him in detaining the prisoner after he left Virginia or not. If Congress has authorized the Circuit Judge sitting at Baltimore to bring those detained in violation of the Constitution from Virginia there, they must be brought, and when the custodian gets to the border of Virginia, if he thinks his warrant not sufficient in Maryland, he must release the prisoners.

But if the order of the Circuit Judge is legal, of course the warrant by which the prisoner is held will be as good in Maryland as it is in Virginia.

In contemplation of law, the prisoner is in custody of the authorities of the State of Virginia wherever they may be lawfully orded to carry him, until he is discharged by order of the Judge awarding the writ,

and no other person could lawfully interfere with that custody.

2. The demurrer to the return was the proper proceeding to raise the issue to be decided. Taking all that the return stated to be true, it was not sufficient in law. It alleges that the petitioner was held because he sold goods without a license. But that is, of itself, an insufficient ground for detaining a person in Virginia, since, under the law prevailing there, a person may sell goods lawfully without a license. It is the law there that when one has tendered coupons and demanded his license he may pursue his business without a license. The return should have stated thas he was selling goods without a license, *and that he had not tendered coupons and demanded his license.* Failing in this, it was clearly open to demurrer as an insufficient return.

But, suppose the petitioner could have been called upon to traverse this return, what would that traverse have been? Simply a repetition of the allegations of the petition, and as he had already alleged them and stood by them, why should he have been compelled to cumber the record by alleging them again? Good pleading requires that the defendant should first have denied the allegations of the petition, and then set up the warrant by which he held the petitioner. Failing in this, his return should, as the learned Circuit Judge held, have been treated as, in substance, a demurrer to the petition.

The truth is, whatever may have been held in respect to other habeas corpus acts, the act of Congress is to be judged by its own terms. It contemplates that no formalties or technicalities are to interfere

with the Judge ascertaining the true state of affairs and acting accordingly. The Circuit Judge was satisfied the allegations of the petition were true, and the state of the pleadings authorised him to think so, the State was given an opportunity to deny them if she could, and she did not; and, finally, the prisoner was present before the Judge who could have sworn him and examined him as to the truth of the statements if he had had any doubt on that subject.

3. There is no difference between a case made under the act involved here and under that involved in *Chaffin* vs. *Taylor*, 116 U. S., which the Attorney General studiously ignores. The point of *Chaffin* vs. *Taylor* was that the State of Virginia could not for one moment suspend the legal effect of a tender of her coupons. It makes no difference whether she requires the party to pay up money during the period of suspension or simply requires him to desist from his business during that period. In either case she undertakes to suspend the legal effect and operation of her contract, and this is beyond her power.

4. To claim at this late day that there has ever been such a thing as a spurious coupon is enough (I say it with all respect) to make a horse laugh. In all the litigation that has grown out of these coupons not one spurious one has ever been produced. In my brief in *Antoni* vs. *Greenhow*, 107 U. S., I referred the court to the proofs that none have ever existed, and Mr. Justice Field, in his dissenting opinion in that case, refers to and remarks upon these proofs.

5. Supposing the Attorney General could prevail upon the court to recede now from what it held in

Poindexter vs. *Greenhow*, I suppose he would hardly contend that the eleventh amendment forbade the Federal courts to discharge a prisoner held by a State in violation of the Constitution of the United States. If this be so, I see no pertinency in his discussion of *Poindexter* vs. *Greenhow*, and I shall not follow him through it. So far as the matter in hand is concerned, that discussion is of an abstract question, with which this case has nothing to do; and I propose to rest upon that decision until the facts of some other case call it up for review.

6. I cannot forbear to call the court's attention to the following language, to be found on the 51st page of the Attorney General's brief:

> "If, under the Constitution, this court has jurisdiction to pronounce judgment against Virginia upon her obligations, she would bow with becoming reverence to its decision, and the litigation which fills the Federal courts would end.
>
> "*But as it is, she declines to recognize the authority of a decision* which assumed to adjudge her responsibility upon her contracts in a suit to which she was *held* not a party."

Here is a distinct statement from the State's official representative, that she will not respect or obey the judgments of this court, and that she will continue to make "the litigation which fills the federal courts" necessary. There is no misunderstanding the particular litigation referred to.

The Attorney-General means to say that notwithstanding the fact that this court has solemnly adjudged that after one has tendered coupons his tax is paid, and the Constitution of the United States

protects him from being molested in respect to the same. Yet the State of Virginia refuses to acknowledge that to be an adjudication of the law that can control her, and she will continue by her legislative enactments to molest those who seek to stand upon their constitutional right, by forcing her collectors to levy upon the property of direct tax payers, and by causing the arrest and prosecution of license tax payers.

Waiving all comment upon the question whether this is not simply rebellion against the authority of the National Government, is suffices for me to ask the court whether the petitioner should be compelled to go through with the formality and annoyance of a trial which is declared before hand to be prosecuted simply for his vexation and annoyance?

If this statement of the Attorney-General stood alone, I would feel compelled to believe that he had said more than he intended to say. But when the court reads the legislation which I have set out in my brief in chief, and the affidavit which I have appended thereto, it will see that her Attorney-General has not overstated his case, and that he means just what he has said.

WM. L. ROYALL.
For Appellee.

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SUPREME COURT OF THE UNITED STATES.

CARPER vs. FITZGERALD.

Chronological Account of the acts of the Virginia Legislature.

PART OF WILLIAM L. ROYALL'S BRIEF.

When the Readjuster party came into control, in 1881–'82, its first acts were the passage of a new funding act, generally known as the "Riddleberger bill," to be found at page 88, Acts 1881–'82, commented on by Mr. Justice Mathews, 114 U. S. R., p. 305.

To compel funding under it, it enacted two acts, named by it respectively "Coupon Killer No. 1" and "Coupon Killer No. 2." The first of these is set out at large in the opinion of the court in *Antoni* vs. *Greenhow*, 107 U. S. R., at page 771. The second is set out in my Brief in this case at page 17. Immediately this court sustained the constitutionality of the first of these, so far as governing affirmative proceedings in *Antoni* vs. *Greenhow*, *supra*.

The Readjusters were thereupon happy, and considered no more legislation necessary to destroy the coupons. But, on the 15th of May, 1883, Hon. H. L. Bond, United States Circuit Judge for the District of Virginia, decided, in *Allen* vs. *Baltimore and Ohio R. R. Co.*, that the tender of the coupons paid the tax; that it was a trespass to levy for the tax after such tender, and that the officer would be enjoined from making the levy. This case came to this court by appeal, and will be found in 114 U. S. R., 311. The preliminary injunc-

tion will be found at page 1 of the record, and shows that it was awarded May 15, 1883, and the opinion of the Judge, laying down the law contained in the record, shows that it was delivered when the preliminary injunction was granted. This demonstrated to the Readjusters that further "coupon killing" legislation was necessary. Accordingly, the Legislature promptly passed joint resolutions, declaring that it was vain for the creditors to hope to coerce out of the State better terms than those offered in the "Riddleberger" funding act. This joint resolution will be found at page 13 of my Brief. And again, on the 19th of March, 1884, it by a preamble again resolved, as earnestly as before, that it would destroy the coupons if the creditor did not fund; and, by way of giving emphasis to the resolution, it provided in that resolution that whenever a coupon found its way into the treasury it should be charged up against the principal of the bond, and when enough had been so charged, that the bond should be deemed to be paid. This preamble and act are on page 14 of my Brief.

It added further emphasis to the resolutions by forbidding any one to sell the State's coupons to her tax-payers unless he paid her a license-tax of $1,000 per annum and twenty per cent. of the face value of the coupons sold. This act is at page 14 of my Brief. It also required any attorney at law who should bring a suit under "Coupon Killer No. 1," to recover back money where coupons had been tendered for taxes, to pay, in addition to his general license-tax as an attorney at law, a special license-tax for that privilege of $250. This act is printed at the end of this paper.

It further provided that whenever a judgment was rendered against the State under "Coupon Killer No. 1," the attorney for the Commonwealth should take an appeal, whether there were grounds for it or not. Of course the plain object of this act was to have ten thousand cases pending upon the docket of the appeal court, which would postpone suitors so long they would give up the contest. This act is at page 18 of my Brief.

"Coupon Killer No. 2," at page 17 of my Brief, forbade any court to enjoin a collector from levying on a tax-payer's

property after a tender of coupons, and the third section of an act approved March 13, 1884, at page 18 of my Brief, forbade any one to sue a collector for damages for levying on his property after a tender of coupons. They also forbade absolutely the receipt of coupons for license-taxes. See *Royall* vs. *Virginia*, 116 U. S. R.

It will thus be seen that, so far as her own courts were concerned, she had guarded herself very effectually against danger from the coupons, and here she rested, waiting for further developments, and serene in her sense of security.

But on April 20, 1885, this court decided the case of *Poindexter* vs. *Greenhow*, 114 U. S. R., 269, and thereby gave her sense of security a rude shock; and on the first of February, 1886, that shock was increased almost to paralysis, by this court's decisions in *Barry* vs. *Edmunds*, 116 U. S. R., 550; *Chaffin* vs. *Taylor*, *ib.*, 567; and *Royall* vs. *Virginia*, *ib.*, 572. Something must be done or the ship of State would go down. Her statesmen saw that new safeguards must be provided or everything would go to the bad. They accordingly took the subject in hand with the following results:

First and foremost, they provided that if any collector was mulcted in damages for levying on a tax-payer's property after a tender of coupons, those damages should be paid out of the State's treasury. This act is at page 8 of my Brief.

Then they provided that, in order to prove that any one of the State's coupons were actually her coupons, the bond from which it was cut must be produced. This act is at page 16 of my Brief. And they supplemented this with another act, which forbade the use of expert testimony to prove that one of her coupons was her coupon. This act is at page 16 of my Brief.

They then provided that any lawyer who gave the benefit of his professional services to any one asserting legal rights based upon her coupons should be guilty of barratry and be disbarred, and that whoever, not being a lawyer, should give any one any assistance in making good his rights based upon her coupons should be guilty of champerty, and fined $500 and imprisoned sixty days. These two acts are at page 15 of of my Brief.

And finally, to meet *Royall* vs. *Virginia*, and reserve some hope for license-taxes, they provided that when coupons were tendered for a license they should be received for verification only; but while verification was going on the party should do no business (having already made it impossible to verify). This act as to licenses is at page 23 of my Brief. I deem it proper to say the following, in explanation of my reason for attaching to my Brief the affidavit found there:

The report of the cases of *Willis* vs. *Miller* and *Strickler* vs. *Yager*, appearing as they do in an authentic publication, often referred to by the court, may be taken as part of the history of the day, of which the court will take judicial notice. What is said in my affidavit relative to the Indemnity Board, the circular issued by it, and what Attorney-General Ayers said on those trials, are contained in that report of those cases. I have thought that as the reports may be read, it cannot possibly injure any one for one who knows the report to be correct to swear to that fact.

So far as the rest of the affidavit is concerned, it is my deliberate belief that the court has a right to know that the authorities of the State are enforcing the acts respecting champerty and barratry against those asserting rights based upon the State's coupons only.

The Attorney-General will no doubt seize on this paper as evidence of his proposition that suits against her officers are really suits against the State. No one ever denied, no one ever doubted, that suits against her officers for trespassing upon tax-payer's rights after they have tendered coupons will result in the State being compelled to redeem those coupons if her tax-payers choose to use them. That was exactly why the coupons were made tax-receivable. But that consequence does not at all tend to show that the suit is against the State. It is only giving its legitimate effect to an improvident contract which she chose to make, and of which she cannot now impair the obligation. It was optional with her whether she would make the contract or whether she would not. She chose to make it. One logical consequence of the contract was that if her tax-payer chose to tender it for his taxes those taxes were thereby paid, and whoever molested him thereafter

5. This act shall be

in respect to them, whether State officer or individual, would be a trespasser, acting without authority of law. The fact that the litigation will result in her being compelled to pay her debt does not prove that the suit against her officer is a suit against her. It only proves that she has made a binding contract that it was entirely within her power to make, the legitimate outcome of which will be, if her tax-payers choose to avail themselves of it, that she will be compelled to pay her debt, notwithstanding the fact that she is exempt from suit. Ordinarily a debtor can be compelled to pay his debt only by suit. But the State of Virginia said to her creditors, "As I cannot be compelled to pay by suit, to induce you to fund your bonds and release me from one-third of your debt, I will give you a substitute for a suit against me which will just as effectually compel me to pay as if I could be sued." It was because she could not be sued that this contract, by which her officers could be sued if they molested the tax-payer after a tender of coupons, was entered into.

To say, therefore, that a suit against the officer, under these circumstances, is a suit against the State is wholly to ignore the very thing which caused the contract to be entered into and the end which both parties had in view. It was because she could not be sued that she stipulated that if her officers molested parties after a tender of coupons they might be sued. It is as though she had said to them, "You shall have an effectual substitute for a suit against me. I cannot collect my revenue after you tender coupons without making my officers commit a trespass by levying on you, and I cannot of course make them levy, because you can sue them and make them pay damages if I do."

The act requiring attorneys at law bringing suits under "Coupon Killer No. 1" to pay a license-tax of $250, in addition to his general license-tax, is as follows:

Section 90 of chapter 450 of the Acts of 1883-'84 provides that every attorney at law shall take out a revenue license in addition to his license to practice law. It then provides:

"A revenue license to practice law in any county or corporation shall authorize such attorney to practice in all the courts of this State without additional license."

Section 91 is as follows:

"Every attorney at law who has been licensed for less than five years shall pay fifteen dollars; and all attorneys who have practiced for five years and more twenty-five dollars: provided that no attorney at law shall be required to pay more than fifteen dollars whose receipts are less than five hundred dollars per annum: *provided further, no attorney licensed under this act shall be allowed to bring suit against the Commonwealth, or any treasurer or collector of taxes, for the recovery of money for coupons tendered for taxes, unless he take out a special license therefor; for which privilege he shall pay a specific license-tax, in addition to the tax required under this section, of two hundred and fifty dollars.*"

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Wm L Royall